Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 162

(T.D. 88–43)

CUSTOMS REGULATIONS AMENDMENT REGARDING THE FORFEITURE OF GOODS SEIZED UNDER 19 U.S.C. 1592

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations relating to the forfeiture of goods seized under the provisions of § 592, Tariff Act of 1930, as amended (19 U.S.C. 1592), which deals with penalties for fraud, gross negligence and negligence. The amendment eliminates the provision for the summary forfeiture of goods seized thereunder and replaces it with a provision calling for the referral of the case to the Department of Justice for the institution of court proceedings.

EFFECTIVE DATE: July 27, 1988.

FOR FURTHER INFORMATION CONTACT: Edward T. Rosse, Penalties Branch, (202)–566–8317.

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Customs Procedural Reform and Simplification Act of 1978 (Pub. L. 95–410), made numerous amendments to statutes administered by Customs which relate to fines, penalties, forfeitures, and liquidated damages for violation of Customs and navigation laws. Changes, as hereto relevant, were made to § 592, Tariff Act of 1930, as amended (19 U.S.C. 1592), covering the entry of merchandise by fraud or negligence. Amendments to the Customs Regulations to establish new procedures and reflect these changes were contained in T.D. 79–160 which was published in the Federal Register on June 4, 1979 (44 F.R. 31950). Section 162.75(d)(3) regarding the forfeiture of goods seized under § 592, Tariff Act of 1930, as amended (19 U.S.C. 1592), was added to the Customs Regulations in T.D. 79–160. It provided for referral of the case to the Department of Justice or sum-

mary forfeiture of the referenced seized goods depending on their value pursuant to § 607, Tariff Act of 1930, as amended (19 U.S.C. 1607).

The U.S. Court of International Trade, in Slip. Op. 86–3 regarding *United States* v. *One Red Lamborghini (VIN ZA 190000ELA12133) and One Black Lamborghini (VIN ZA 190000ELA12144),* Court No. 85–10–01393, held that 19 U.S.C. 1592 does not provide a cause of action for forfeiture *in rem.* Based upon this, Customs has concluded that summary forfeiture may not be accomplished under such statutory provision regardless of the value of the seized merchandise. Accordingly, the Customs Regulations are being herein amended to reflect same. The amendment provides that, if neither a petition for relief is filed nor compliance is made with the penalty/seizure decision within the time provided by law, the case should be referred to the Department of Justice with a report of the facts for the institution of court proceedings. The amendment does not alter the regulations concerning the summary forfeiture of merchandise for violations of statutory provisions other than 19 U.S.C. 1592 or situations constituting violations under 19 U.S.C. 1592 and another statute. The amendment does not alter the regulatory provisions of § 162.75, Customs Regulations (19 CFR 162.75), regarding the seizure of merchandise for violation of 19 U.S.C. 1592 in prescribed circumstances.

Inapplicability of Public Notice and Delayed Effective Date Provisions

Inasmuch as the amendment merely conforms the Customs Regulations to the applicable statutory provision, as interpreted by the U.S. Court of International Trade, and, thereby, extends a benefit to owners of certain seized merchandise, it is in the public interest to make the regulatory change effective as soon as possible. Accordingly, notice and public procedure are unnecessary pursuant to 5 U.S.C. 553(b)(B), and for the same reasons, pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

Executive Order 12291

Because this document will not result in a "major rule" as defined in E.O. 12291, Customs has not prepared a regulatory impact analysis.

Regulatory Flexibility Act

It is certified under § 3 of the Regulatory Flexibility Act (5 U.S.C. 605(B)), that the regulation will not have a significant economic impact on a substantial number of small entities.

Drafting Information

The principal author of this document was Arnold L. Sarasky, Regulations and Disclosure Law Branch, U.S. Customs Service.

However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 162

Administrative practice and procedure, Customs duties and inspection, Imports, Law enforcement, Penalties, Search warrants, Seizures and forfeitures, Reporting and recordkeeping requirements.

AMENDMENT TO THE REGULATIONS

Part 162, Customs Regulations (19 Part 162), is amended as set forth below:

PART 162—RECORDKEEPING, INSPECTION, SEARCH, AND SEIZURE

1. The general authority citation for Part 162, as hereto pertinent, continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 1624.

2. Section 162.75 is amended by revising paragraph (d)(3) to read as follows:

§ 162.75 Seizures limited under § 592, Tariff Act of 1930, as amended.

* * * * * * *

(d) *Release of seized merchandise—*

(3) *Forfeiture.* If neither a petition for relief is filed in accordance with Part 171 of this chapter, nor compliance made with the decision within the time provided by law, the district director immediately shall report the facts and refer the case to the Department of Justice for the institution of court proceedings.

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: July 13, 1988.

SALVATORE R. MARTOCHE,
Acting Assistant Secretary for Enforcement.

[Published in the Federal Register, July 27, 1988 (53 FR 28194)]

(T.D. 88–44)

SYNOPSES OF DRAWBACK DECISIONS

The following are synopses of drawback rates issued January 3, 1983, pursuant to Part 22; and November 20, 1986, pursuant to Subpart I, Part 191, of the Customs Regulations.

In the synopses below are listed for each drawback rate approved under section 1313(g), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the Regional Commissioner to whom the rate was forwarded, and the date on which it was issued.

Dated: July 22, 1988.

File: 220728

JOHN DURANT,
Director,
Commercial Rulings Division.

(A) Company: Bender Shipbuilding & Repair Co., Inc.
Vessels: Tugs; tug supply boats; supply boats; offshore oil vessels; cargo vessels; passenger vessels and fishing vessels
Merchandise: Main and auxiliary machinery such as engines, gears, pumps, propellers, winches, capstans, etc.; electronic equipment such as radars, radios, compasses, automatic pilot, depth sounder, Loran, radio direction finder, etc.; various electrical equipment; miscellaneous equipment such as life saving, fire fighting, etc; steel angles, pipe, tubing, beams, channel, and plate
Shipyard: Mobile, AL
Statement signed: October 7, 1982
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New Orleans, January 3, 1983

(B) Company: Tacoma Boatbuilding Co.
Vessels: Naval Corvettes
Merchandise: Weapon control systems; launches; gun mounts; electrical systems; magnetic compasses; anchor chains; communication systems, etc.
Shipyard: Tacoma, WA
Statement signed: September 15, 1986
Basis of claim: Used in
Rate forwarded to RC of Customs: Los Angeles (San Francisco Liquidation Unit), November 20, 1986

19 CFR Part 10

(T.D. 88–45)

CUSTOMS REGULATIONS AMENDMENT CONCERNING RECIPROCAL PRIVILEGES EXTENDED TO AIRCRAFT OF JAPAN

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by changing the list of countries whose aircraft are exempt from the payment of Customs duties and internal revenue taxes on supplies and equipment withdrawn from Customs or internal revenue custody for use by aircraft. The amendment indicates that aircraft of Japanese registry are no longer entitled to free withdrawal of ground support equipment.

Prior to 1986, Japan had been extending aircraft of U.S. registry exemption privileges in connection with international commercial operations which were substantially reciprocal to those exemption privileges the U.S. provided to aircraft of foreign registry by section 309 and 317 of the Tariff Act of 1930, as amended. Accordingly, the Customs Regulations provided that aircraft of Japanese registry were entitled to free withdrawal privileges. However, the Department of Commerce has informed Customs that Japan is no longer extending the exemption privileges to ground support equipment of U.S. aircraft. According, the U.S. will no longer exempt aircraft of Japanese registry from the payment of duties and taxes when their ground support equipment is withdrawn from Customs or internal revenue custody.

EFFECTIVE DATE: July 28, 1988.

FOR FURTHER INFORMATION CONTACT: William G. Rosoff, Entry Rulings Branch (202) 566–6040.

SUPPLEMENTARY INFORMATION:

Background

Sections 309 and 317, Tariff Act of 1930, as amended (19 U.S.C. 1309 and 1317), provide that foreign-registered aircraft engaged in foreign trade may withdraw artiles of foreign or domestic origin for use as supplies (including equipment), ground equipment, maintenance or repair of the aircraft from Customs or internal revenue custody without the payment of Customs duties and/or internal revenue taxes. This privilege is granted if the Secretary of Commerce finds and advises the Secretary of the Treasury, that the country in which the foreign aircraft is registered allows substantially reciprocal privileges to U.S. registered aircraft. Section 10.59(f), Customs

Regulations (19 CFR 10.59(f)), lists those countries whose aircraft have been found to be entitled to these privileges.

By virtue of the authority vested in the President by section 5 of the Act of May 28, 1908, 35 Stat. 425, as amended (46 U.S.C. 104), the President has delegated the authority to issue this list of nations to the Secretary of the Treasury by E.O. 10289, September 17, 1951. By Treasury Department Order 165–25, the Secretary of the Treasury delegated authority to the Commissioner of Customs to prescribed regulations relating to section 10.59(f) and other sections of the Customs Regulations relating to lists of countries entitled to preferential treatment in Customs matters because of reciprocal privileges accorded to vessels and aircraft of the U.S. Subsequently, by Customs Delegation Order No. 66 (T.D. 82–201), dated October 13, 1982, the Commissioner delegated authority to amend this section to the Assistant Commissioner (Commercial Operations), who redelegated this authority to the Director, Office of Regulations and Rulings, who then redelegated it to the Chief, Regulations and Disclosure Law Branch.

In accordance with 19 U.S.C. 1309(d), the Secretary of Commerce previously found, and advised the Secretary of the Treasury that Japan allowed privileges substantially reciprocal to those provided for in 19 U.S.C. 1309 and 1317 to aircraft registered in the U.S. and engaged in foreign trade. Therefore, by T.D. 53550, Japan was listed in § 10.59(f), Customs Regulations and corresponding privileges were extended to aircraft registered in Japan engaged in foreign trade.

The Commerce Department has now determined, and conveyed to the Customs Service, that Japan no longer exempts ground support equipment of aircraft of U.S. registry from taxes and duties. The finding became effective on August 1, 1986. This document amends § 10.59(f), Customs Regulations (19 CFR 10.59(f)), by changing the list of countries whose aircraft are exempt from the payment of Customs duties and internal revenue taxes on suppliers and equipment withdrawn from Customs or internal revenue custody for use by aircraft to indicate that Japan has discontinued its exemption regarding ground support equipment.

Executive Order 12291

This document does not meet the criteria for a "major rule" as defined in § 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

Regulatory Flexibility Act

Pursuant to the provisions of section 605(b) of the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601, *et seq.*), it is certified that the change set forth in this document will not have a significant economic impact on any substantial number of small entities.

Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

INAPPLICABILITY OF PUBLIC NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS

Because the subject matter of this document does not constitute a departure from established policy or procedures but merely announces the decision of a previously granted exemption for which there is a statutory basis, it has been determined, pursuant to 5 U.S.C. 553(b)(B), that notice and public procedure thereon are unnecessary. As Japan has been found by the Department of Commerce to have discontinued its exemption privileges regarding ground support equipment in 1986, a delayed effective date is not appropriate.

DRAFTING INFORMATION

The principal author of this document was Leo H. Kramer, Regulations and Disclosure Law Branch, Office of Regulations and Rulings, Customs Headquarters. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 10

Customs duties and inspection, Imports, Exports, Oil imports, Petroleum.

AMENDMENT TO THE REGULATIONS

Part 10, Customs Regulations (19 CFR Part 10), is amended as set forth below:

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The general authority citation for Part 10 and specific relevant authority continues to read as follows:

Authority: 19 U.S.C. 66, 1202, 1481, 1484, 1498, 1623, 1624. § 10.59 also issued under 19 U.S.C. 1309, 1317.

2. In the list of countries in § 10.59(f), the listing for Japan is amended by adding ", 88 –45" under the column marked "Treasury Decision(s)" and by adding "not applicable to ground support equipment as of August 1, 1986" in the column marked "Exceptions if any, as noted—".

Dated: July 22, 1988.

KATHRYN C. PETERSON,
Chief,
Regulations and Disclosure Law Branch.

[Published in the Federal Register, July 28, 1988 (53 FR 28378)]

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., July 20, 1988.

The following are decisions of the United States Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

(C.S.D. 88–7)

This ruling holds that the use of certain cable burial devices from or with a cable vessel is not an engagement in dredging within 46 U.S.C. App. 292. C.S.D. 79–331 is distinguished.

Date: March 29, 1988
File: VES–10–02/VES–3–01
CO:R:P:C 109412 PH
Category: Carriers

RODNEY L. JOYCE, ESQ.
GINSBURG, FELDMAN AND BRESS
1250 Connecticut Avenue, NW
Washington, D.C. 20036

RE: Applicability of dredging law, 46 U.S.C. App. 292, to cable laying operations in United States territorial waters

DEAR MR. JOYCE:

This in response to your letter of March 7, 1988, in which you request a ruling on the applicability of 46 U.S.C. App. 292 to cable laying operations in United States territorial waters. In order to protect the proprietary and commercial interests of your client, you request CONFIDENTIALITY for your letter. You also request that the ruling we issue in response to your letter not mention by name the specific communications cable project prompting this letter, any of the parties involved in this project, or any of the equipment to be

used for the installation and repair of cable in this project. Your letter will be treated as you request and, as you can see, this ruling has been written in accordance with your request for confidentiality.

Facts:

You state that your client in this matter is involved in the construction, installation, and maintenance of a submarine fiber optic cable in the Atlantic Ocian. To protect submarine cable from trawling, mollusc dredging, anchoring, general dredging operations, and other marine activities, you state that cable in shallow water, which you define as less than 3,000 feet, must be buried in the seabed. You state that burial equipment is used in conjunction with cable ships and that modern cable burial equipment is maneuvered from aboard a cable ship with remote electronic controls. You state that the cable under consideration is to be buried up to 3 feet deep from the United States shoreline to a point approximately 103 nautical miles from shore.

In this operation, two different cable ships and two different burial devices are to be used. You state that these vessels are foreign-built vessels; that there are no commercial cable vessels in existence today which were manufactured in the United States. We assume for purposes of this ruling that the burial devices are also foreign-built.

The burial devices are described in an enclosure with your letter. It is currently the intent of the parties involved in this operation to use the first of these burial devices, a remotely controlled submersible vehicle (RCSV), for cable burial in United States territorial waters.

The RCSV is described as a specialized, highly developed underwater robot equipped with cable tracking devices, cable burial and "deburial" tools, as well as manipulating capabilities. The RCSV buries cable by the use of water jetting nozzles which emulsify the seabed beneath the cable. This emulsification process creates a temporary "deep narrow slot, typically eight inches wide and up to three feet deep" into which the cable is guided. You state that no seabed material is removed by this process and sea currents completely restore the seabed to its original state, at a minimum within several hours and, almost always, within several days.

You state that this device is also used with a cable vessel for the repair of buried cables. In repair operations, the RCSV is deployed from a host cable vessel to the seabed. On the seabed, the RCSV searches for and locates the cable. After the cable is located, the RCSV exposes a small portion of it by use of its jetting nozzles. The cable is cut and special grippers are attached to the cable ends. The cable ends are lifted to the surface and repaired on the cable vessel in the normal fashion. Upon completion of the repairs, the cable is

laid back onto the seabed and the RCSV is deployed to bury the exposed cable in the seabed as described above.

The other burial device is a sled-like contraption which creates a subsoil channel by operation of a share or plow and a disc cutting wheel. A narrow wedge of soil, approximately seven inches in width, is cut. This wedge of soil is lifted upwards at an angle and the cable is placed at the bottom of the furrow. After placement of the cable, the wedge of soil falls back in place and, you state, the seabed is left virtually undisturbed. The depth of burial depends, to a large extent, upon the nature of the seabed but, in soft sediment conditions, you state that a burial depth of three feet can be achieved.

It is requested that we rule on the following issue.

Issue:

Is the use in United States territorial waters of the cable burial devices described in the FACTS portion of this ruling an engagement in dredging in the United States, for purposes of 46 U.S.C. App. 292?

Law and Analysis:

Section 1 of the Act of May 28, 1906 (34 Stat. 204; 46 U.S.C. App. 292), provides that "a foreign-built dredge shall not, under penalty of forfeiture, engage in dredging in the United States unless documented as a vessel of the United States." In our interpretation of this statute, we have ruled that dredging in the United States is prohibited to any foreign-built dredging vessel except one of those named in section 2 of the 1906 Act (see Customs Service Decision (C.S.D.) 85–11).

For purposes of 46 U.S.C. App. 292, dredging in the United States includes dredging in United States territorial waters, generally defined as the belt, 3 nautical miles wide, adjacent to the coast of the United States and seaward of the territorial sea baseline, and certain dredging on the United States outer continental shelf (OCS) outside territorial waters (see C.S.D. 85–11). With regard to the applicability of section 292 to the OCS, we have held that the statute only applies with regard to dredging on the OCS for the purposes described in section 4(a) of the Outer Continental Shelf Lands Act of 1953, as amended (43 U.S.C. 1333(a)), and not to dredging done to prepare the seabed of the OCS for the laying of a trans-oceanic cable (see ruling dated July 22, 1987, file number 109016).

In our application of 46 U.S.C. App. 292, we have long held that "dredging," for purposes of that statute, means the use of a vessel equipped with excavating machinery in digging up or otherwise removing submarine material. Using this definition of "dredging," we have ruled that the use of a foreign-built vessel to tow an underwater sea plow to create a furrow into which a pipe is to be laid during the course of pipe laying operations is prohibited by section 292 be-

cause the vessel is considered to be engaged in dredging (see C.S.D. 79–331).

Following the above ruling on the use of an underwater sea plow in pipe laying operations, we have ruled that the use of a device to create a furrow or trench in which cable is buried during the course of cable laying operations is dredging within the meaning of section 292. In a ruling dated April 5, 1985 (file number 107520), we stated that trenching preparatory to the laying of cable in a cable laying operation would be considered dredging within section 292 if the trenching was to be done by a mechanism used in connection with a vessel, whether the mechanism operated with compressed air or any other method. We ruled that the use of a vessel with a sea plow and a remote controlled submersible vehicle in the plowing for and burying of the shore end of a transatlantic fiber-optic cable would be dredging within section 292 (see ruling dated March 14, 1986, file number 108222). In a ruling issued to another party with regard to the operation under consideration, we held that the use of the RCSV to "emulsify" the seabed in order to bury a cable in the course of a cable laying operation is dredging within section 292 (see ruling dated November 3, 1987, file number 109199).

Among navigation laws other than section 292 which Customs interprets and enforces is the so-called Jones Act (41 Stat. 999; 46 U.S.C. App. 883). This statute prohibits the transportation of merchandise between points in the United States embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any vessel other than a vessel built in and documented under the laws of the United States and owned by citizens of the United States. In applying this statute to cable laying, we have consistently ruled that the sole use of a vessel for the laying of cable, even if the vessel loads the cable at one coastwise point and lays it in United States territorial waters and/or between coastwise points, is not coastwise trade subject to section 883 (see e.g., C.S.D. 79–346 and ruling dated June 21, 1982, file number 105648).

In the case under consideration there is a comprehensive factual description of the processes by which the cable is buried. It is clear from this factual description that only a very narrow "slice" of the seabed is temrporarily lifted so that the cable may be buried beneath that slice of the seabed (the RCSV, although not actually cutting a slice of the seabed, by its jetting action and the resulting emulsification process creates a similar effect). After the cable is buried, soil of the seabed, whether "sliced out" or emulsified, returns to the seabed so as to leave the seabed virtually undisturbed.

In view of the limited and temporary manipulation of the seabed effected by cable burial devices such as those under consideration and in view of the treatment of cable laying vessels under the coastwise laws, we believe that the use in United States territorial waters of such cable burial devices is not an engagement in dredging in the United States within 46 U.S.C. App. 292 when the cable buri-

al devices are used from the cable laying vessel. We so rule when the cable burial devices are used as described from the cable laying vessel in initial cable laying operations or from the cable repair vessel in cable repair operations. This ruling is distinguished from C.S.D. 79–331 because that ruling involved the preparation of the seabed for *pipe laying* by the towing of a plow on the seabed *before* or at the same time as the pipe was to be pulled in place. This ruling reverses the cable laying rulings discussed above insofar as those rulings involve the use from a cable laying vessel of a cable burial device similar to the cable burial devices considered in this ruling.

Holding:

The use in United States territorial waters from a cable laying or repair vessel of cable burial devices which temporarily remove from the seabed, by either an emulsification process or a share or plow and cutting disc, a very narrow "slice" of the seabed under which the cable is buried is not an engagement in dredging in the United States, for purposes of 46 U.S.C. App. 292.

Effect on Other Rulings:

C.S.D. 79–331 is DISTINGUISHED.

Rulings dated April 5, 1985 (file number 107520), January 30, 1986 (file number 108145), March 14, 1986 (file number 108222), and November 3, 1987 (file number 109199), are REVERSED insofar as they involve the use from a cable laying vessel of a cable burial device similar to the cable burial devices considered in this ruling.

(C.S.D. 88–8)

This ruling holds that vessels arriving from foreign ports in coastwise trade are not subject to tonnage tax; however, these vessels are subject to tonnage tax when arriving in ballast. C.S.D. 87–16 is modified.

Date: April 1, 1988
File: VES–11–05 CO:R:P:C
108700/109303 PH
Category: Carriers

RUSSELL W. MACKECHNIE, JR., ESQ.
JOSEPH R. DONOHUE, ESQ.
DONOHUE & DONOHUE
26 Broadway
New York, New York 10004

RE: Applicability of tonnage tax to vessels arriving in the United States from a foreign port in the coastwise trade or in ballast (see also Customs Service Decision (C.S.D.) 87–16)

DEAR MESSRS. MACKECHNIE AND DONOHUE:

This in further regard to our ruling dated May 22, 1987 (File: VES–11–05/VES–5–29/VES–3 CO:R:CD:C 108700 PH), which was published as C.S.D. 87–16. We stated in our letter to you of March 17, 1988, that we planned to review the aspects of this C.S.D. concerning the applicability of tonnage tax to the vessels under consideration. We are having this ruling published in the CUSTOMS BULLETIN.

Facts:

In C.S.D. 87–16, we ruled, among other things, that vessels considered in the C.S.D. are subject to tonnage tax when they arrive in ballast in the United States after transporting Alaska North Slope oil from Alaska to Panama and when they arrive in United States Gulf or East Coast ports with Alaska North Slope oil from Panama. The relevant facts upon which we ruled in C.S.D. 87–16 are as follows:

> * * * [A] number of coastwise-qualified vessels are used to transport Alaska North Slope oil from Valdez, Alaska, to United States Gulf and East Coast ports. The vessels are documented with registry and coastwise license endorsements. In Valdez, the vessels load the oil and obtain clearance to the Panamanian port of Puerto Armuelles on the Pacific Ocean. There the vessels discharge the oil and obtain Panamanian clearance to Long Beach, California. At Long Beach, or occasionally at the port of San Francisco, California, the vessels make formal entry and pay tonnage duties. The vessels are replenished with bunkers and stores and change crews. They then proceed to Valdez for the next load of oil.
>
> The oil is transferred by an 80 mile pipeline from Puerto Armuelles to the port of Chiriqui Grande, Panama, on the Caribbean Sea. There, vessels of the company represented by the inquirer load the oil and transport it to United States Gulf or East Coast ports. These vessels arrive in Chiriqui Grande in ballast from United States ports and make entry with Panamanian officials. They discharge dirty ballast at a terminal in Panama for treatment before loading the oil which came through the pipeline. After loading, the vessels obtain Panamanian clearance to a United States Gulf or East Coast port. Upon arrival at the latter port, the vessels make entry with United States Customs and pay tonnage duties.

In a ruling dated March 21, 1988 (file number 109303), to Paul G. Kirchner, Esq., of Kurrus & Kirchner, we ruled on several questions Mr. Kirchner had raised with regard to C.S.D. 87–16. At the same time, we undertook to reconsider other aspects of the C.S.D., including the applicability of tonnage taxes to the vessels under consideration.

Issue:

Are the vessels described in the FACTS portion of this ruling subject to tonnage tax when they arrive in ballast in the United States after transporting the oil from Alaska to Panama or when they arrive in the United States Gulf or East Coast ports with the oil from Panama?

Law and Analysis:

Section 4219, Revised Statutes (1878 Edition), as amended (46 U.S.C. App. 121), provides, in pertinent part, that:

> * * * A tonnage duty of 2 cents per ton, not to exceed in the aggregate 10 cents per ton in any one year, is imposed at each entry on all vessels which shall be entered in any port of the United States from any foreign port or place in North America, Central America, the West India Islands, the Bahama Islands, the Bermuda Islands, or the coast of South America bordering on the Caribbean Sea, or Newfoundland * * * not, however, to include vessels in distress or not engaged in trade.

Section 4220, Revised Statutes (46 U.S.C. App. 122), provides that:

> No vessel belonging to any citizen of the United States, trading from one port within the United States to another port within the United States, or employed in the bank, whale, or other fisheries, shall be subject to tonnage tax or duty, if such vessel be licensed, registered or enrolled.

In order to determine whether this provision exempts from the payment of tonnage tax vessels belonging to citizens of the United States engaged in transportation subject to the coastwise laws and properly documented for such transportation under those laws, we have reviewed the historical development of the laws related to tonnage taxes, the legal history of 46 U.S.C. App. 122, the historical development of the pertinent Customs Regulations, and any Court decisions or other such precedents concerning this issue.

Virtually since the founding of the Republic, laws pertaining to tonnage taxes have given favorable treatment to vessels engaged in coastwise transportation or the fisheries. Chapter 3, Act of July 20, 1789 (1 Stat. 27), and Chapter 30, Act of July 20, 1790 (1 Stat. 135), provided for a 6 cents per ton tax on any vessel having a license to trade between the different districts of the United States or to carry on the bank or whale fisheries, while employed therein, *once per year* for such vessels (while other vessels were charged from 6 to 50 cents per ton *per entry*). This yearly tonnage duty for vessels engaged in coastwise trade or the fisheries remained in effect until 1830 when all tonnage duties were abolished for United States vessels all officers and at least two-thirds of the crew of which were United States citizens and for foreign vessels on a reciprocal basis (Chapter 119, Act of May 31, 1830, 4 Stat. 425). In 1862 tonnage duties were reinstituted with favorable treatment for vessels licensed for and employed in the coastwise trade or fisheries, along with ves-

sels arriving from Mexico, any of the West India Islands, and the British provinces of North America, which were subject to a duty of 10 cents per ton *once per year* (chapter 163, section 15, Act of July 14, 1862, 12 Stat. 558). This annual duty of 10 cents per ton was raised to 30 cents per ton in 1865 (chapter 80, section 4, March 3, 1865, 13 Stat. 493).

In the Act of July 14, 1870 (chapter 255, section 25, 16 Stat. 269), the 1862 Act (see above) was amended so that:

> * * * no ship, vessel, steamer, boat, barge, or flat belonging to any citizen of the United States, trading from one port or point within the United States, to another port or point within the United States, or employed in the bank, whale, or other fisheries, shall hereafter be subject to the tonnage tax or duty provided for in (the 1862 Act) * * *.

Thus, this provision, which was enacted in the Revised Statutes as section 4220, is substantively the same as 46 U.S.C. App. 122. The 1862 Act, which this provision amended, provided that:

> * * * upon all ships, vessels, or steamers, which * * * shall be entered at any custom-house in the United States from any foreign port or place, or from any port or place in the United States, whether ships or vessels of the United States, or belonging wholly or in part to subjects of foreign powers, there shall be paid a tax or tonnage duty of ten cents per ton of the measurement of said vessel, in addition to any tonnage duty now imposed by law * * *.

Although at the time of the enactment of the predecessor of 46 U.S.C. App. 122, vessels entering United States ports from ports or places in the United States were subject to tonnage duty, this has not been so since 1884 (Act of June 26, 1884, chapter 121, section 14, 36 Stat. 111). Because the 1870 Act remained in effect after the 1884 removal of the provision for a tonnage duty on vessels entered in the United States from another port or place in the United States, the only possible application for that provision of the 1870 Act which exempts from tonnage tax properly documented vessels belonging to United States citizens trading from one United States port to another was, and remains under 46 U.S.C. App. 122, to exempt from tonnage tax such vessels engaging in coastwise transportation arriving from a foreign port or place.

The provision which became the tonnage tax provision in the 1870 Act was introduced as an amendment to a tax bill in the House of Representatives by Representative Schenck. This provision provided, in pertinent part, that:

> * * * no ship, vessel, steamer, boat, barge, or flat belonging to any vessel of the United States, trading and arriving from a port of the Untied States, *although touching or stopping at a foreign port on the voyage*, or trading from one port or point within the United States to another port or point within the United States, or employed in the bank, whale, or other fisher-

> ies, shall hereafter be subject to the tonnage tax or duty * * *. [Congressional Globe 4107 (1870).] [Emphasis added.]

Thus, the amendment was in approximately the same form as that of the 1870 Act, except for the language "although touching or stopping at a foreign port on the voyage." This language was removed from the bill in the Senate by the substitution of a new amendment without the language (Congressional Globe 4997 (1870)). Senator Williams, in commenting on the stricken language, stated:

> I know that [i.e., the stricken language] is stricken out, and other language has been substituted; but it is the understanding of the committee that the language of the substitute is equivalent to the language stricken out. My attention has been called to this, and several questions have been asked me about that subject, and I agreed to indicate in the Senate that that was the understanding of the committee.

Senator Edmunds asked: "Is that the fair construction of the law" and Senator Williams responded, "Yes, sir." (Congressional Globe 4997 (1870).)

The legislative history to the 1870 Act is not completely clear with regard to this issue (e.g., see the comments of Senators Corbett and Sherman indicating that they believed that the provision was intended to relieve from tonnage tax vessels in the inland and coasting trade and not "boats or vessels sailing to foreign ports"). We believe, however, that this legislative history does indicate an intent by the Congress to exempt from tonnage tax vessels engaged in the coastwise transportation, including vessels engaged in such transportation arriving from a foreign port or place.

The Customs Regulations issued after the 1870 Act through the 1923 edition of the Customs Regulations exempted from the payment of tonnage tax vessels engaged in the coastwise trade (Article 296, 1874 Customs Regulations; Article 277, 1884 Regulations; Article 183, 1892 Regulations; Article 193, 1899 Regulations; Article 176, 1908 Regulations; Article 119, 1915 Regulations; and Article 118, 1923 Regulations). In the 1931 Customs Regulations, the provisions on tonnage tax and light money (Articles 129–136) were substantially revised and the provision exempting vessels of the United States engaged in the coastwise trade from tonnage tax was omitted, without explanation. The provision exempting vessels engaged in the whale or other fisheries (Article 130(2)(f)), was included, citing 46 U.S.C. App. 122, and section 122 was cited as authority for the general provision on exemptions from tonange tax or duty (Article 130). Since the 1923 Regulations, there has been no provision in the Customs Regulations exempting United States vessels engaged in the coastwise trade from tonnage tax.

At least one Federal Court has stated that vessels licensed to engage in the coastwise trade are exempt from tonnage tax (*Pacific Shrimp Co.* v. *United States*, 375 F. Supp. 1036, 1039 (W.D. Wash.,

1974). The Attorney General of the United States has also stated that vessels documented for the coastwise trade and fisheries are exempt from tonnage duty, citing section 4220 of the Revised Statutes (46 U.S.C. App. 122) (17 Op. Att. Gen. 388, 389 (1882)). Although this court decision and the Opinion of the Attorney General may be considered as dicta, as was stated in C.S.D. 87–16, they are the only such precedent opinions of which we are aware addressing this issue.

On the basis of the foregoing (the general development of the tonnage tax laws, the evidence of Congressional intent with regard to the predecessor of 46 U.S.C. App. 122, the Customs Regulations issued under 46 U.S.C. App. 122 and its predecessors, and the only Federal Court or Attorney General opinions on the matter of which we are aware), we conclude that a United States-owned vessel documented for the coastwise trade is not subject to tonnage tax when engaged in transportation subject to the coastwise laws. The vessels under consideration, when they arrive in a Gulf or East Coast United States port with Alaska North Slope oil, are not subject to tonnage tax.

The vessels arriving in ballast in a United States port, after delivering the Alaska North Slope oil to Panama, are subject to tonnage tax. Such vessels are not considered to be engaged in coastwise transportation subject to the coastwise laws (see our ruling of March 21, 1988, file number 109303, referred to above) and enter the United States from a foreign port or place (see 46 U.S.C. App. 121 and 19 CFR 4.20(a)). This is consistent with our previous rulings on this subject (see, e.g., ruling letter dated June 18, 1958, to the Collector of Customs, New York, New York; telex ruling dated May 18, 1979, file number 103994; and ruling dated March 5, 1984, file number 106474, copies enclosed).

Holding:

The vessels described in the FACTS portion of this ruling are not subject to tonnage tax when they arrive in a Gulf or East Coast United States port with Alaska North Slope oil transported from Panama in the coastwise trade. Such vessels are subject to tonnage tax when they arrive in ballast in a United States port after delivering the Alaska North Slope oil to Panama.

Effect on Other Rulings:

C.S.D. 87–16 is MODIFIED in part.

(C.S.D. 88–9)

This ruling holds that (1) a foreign-built dredge documented in the U.S. may not engage in dredging in the U.S. (2) the use of a foreign-built dredge documented as an American-flag vessel for min-

ing for minerals on the Outer Continental Shelf is an engagement in dredging in the U.S. for the purposes of 46 U.S.C. App. 292. (3) the transportation of the dredged phosphate ore from a dredging site on the Outer Continental Shelf to a U.S. port is coastwise transportation which may only be effected by coastwise qualified vessles.

Date: May 12, 1988
File: VES–3–14 CO:R:P:C
109081 BEW
Category: Carriers

DR. DAVID H. GROVER
MARITIME INFORMATION ASSOCIATES
677 Rio Vista Drive
Napa, California 94558

RE: Applicability of 46 U.S.C. App. 292 and 883 to the exploration for, or the extraction of, resources from the outer Continental Shelf outside the United States territorial waters.

DEAR DR. GROVER:

This is in reference to your correspondence of July 28, 1987, in which you requested an interpretation of the legality of the use of foreign-built dredges or mining vessels for mining on the United States outer Continental Shelf.

Facts:

You state that the mining would be conducted 10 miles off the North Carolina coast, and that the operation would involve hydraulic suction dredging of material which would be placed on barges for transport ashore. You state that the mining vessel would be foreign-built and documented as an American flag vessel and that barges and tugs which would be used in the operation would be built and documented in the United States. You further state that while the vessel may use techniques associated with dredging and may be identified as a dredge, you would in fact be mining for phosphate ore on the outer Continental Shelf. You also state that while you may be using a foreign-built American-flag vessel, the vessel would only enter the port for refuel and resupply.

It is requested that we rule on the following issues:

Issues:

1. Whether a foreign-built dredge documented in the United States may engage in dredging in the United States.

2. Whether the use of a foreign-built dredge documented as an American-flag vessel for mining phosphate ore on the outer Continental Shelf is an engagement in dredging in the United States for the purposes of 46 U.S.C. App. 292.

3. Whether the transportation of dredged phosphate ore from a dredging site on the outer Continental Shelf to a United States port is coastwise transportation.

Law and Analysis:

Section 1 of the Act of May 28, 1906 (34 Stat. 204, 46 U.S.C. App. 292), provides that "a foreign-built dredge shall not, under penalty of forfeiture, engage in dredging in the United States unless documented as a vessel of the United States." In our interpretation of this statute, we have ruled that dredging in the United States is prohibited to any foreign-built dredging vessel except one of those named in section 2 of the 1906 Act (see Customs Service Decision (C.S.D.) 85–11).

For purposes of 46 U.S.C. App. 292, dredging in the United States includes dredging in United States territorial waters, generally defined as the belt, 3 nautical miles wide, adjacent to the coast of the United States and seaward of the territorial sea baseline, and certain dredging on the United States outer Continental Shelf outside territorial waters (see C.S.D. 85–11).

In our application of 46 U.S.C. App. 292, we have long held that "dredging," for purposes of that statute, means the use of a vessel equipped with excavating machinery in digging up or otherwise removing submarine mineral. In the absence of other information, it appears that the mining vessel or dredge you describe would meet this definition and we so assume for purposes of this ruling.

You inquire as to whether a foreign-built dredge documented under the laws of the United States may engage in dredging 10 miles off the coast of North Carolina. As stated above, it is the position of the Customs Service that the prohibition in 46 U.S.C. App. 292 relates to build, and not to the documentation of a dredge. Accordingly, even though a foreign-built dredge has been documented as a vessel of the United States, it would be prohibited by 46 U.S.C. App. 292 from engaging in dredging in the United States.

With regard to the applicability of section 292 to the outer Continental Shelf, we have held that the statute only applies with regard to dredging on the outer Continental Shelf for the purposes described in section 4(a) of the Outer Continental Shelf Lands Act of 1953, as amended (43 U.S.C. 1333(a)) (OCSLA). That statute provides, in pertinent part, that the laws of the United States are extended to "* * * the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom * * * to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State."

Under the foregoing provision, we have ruled that the coastwise laws and other Customs and navigation laws are extended to mobile oil drilling rigs during the period they are secured to or submerged onto the seabed of the outer Continental Shelf. We have applied the same principles to drilling platforms, artificial islands and similar structures, as well as devices attached to the seabed of the outer

Continental Shelf for the purpose of resource exploration operations. We have not, to this date, ruled on the applicability of the coastwise laws and other Customs and navigation laws to the exploration for, development or production of, resources other than petroleum related resources.

"Exploration," "development," and "production" are generally defined under the OCSLA to include the process of searching for minerals, the activities which take place following discovery of minerals, and those activities which take place after the successful completion of any means for the removal of minerals from the outer Continental Shelf. The term "minerals" includes oil, gas, sulphur, geopressured-geothermal and associated resources, and all other minerals which are authorized by an Act of Congress to be produced from "public lands" as defined in 43 U.S.C. 1702 (43 U.S.C. 1331)(k), (l), (m) and (q)).

It is clear that the OCSLA was intended to apply to the exploration for, development or production of resources other than petroleum related resources. This position is consistent with judicial interpretations of the OCSLA.

In *Guess* v. *Read*, C.A. La. 290 F.2d 622, 625 (1961), cert. denied 386 U.S. 957, 82 S.Ct. 394, 7 L.Ed.2d 388 (1962), the Court held that "[t]he Continental Shelf Act was enacted for the purpose, primarily, of asserting ownership of and jurisdiction over the minerals in and under the Continental Shelf." In *Treasure Salvors Inc.* v. *Unidentified Wrecked and Abandoned Sailing Vessel*, C.A. Fla. 1978, 569 F.2d 330, 339, the Court held that, "(t)he structure of the Act itself, which is basically a guide to the administration and leasing of offshore mineral-production properties, reinforces this conclusion." The Court said that "[t]he Act consists almost exclusively of specific measures to facilitate exploitation of natural resources on the continental shelf." The Court noted that the interpretations of the Convention of the Continental Shelf and the Act by legal scholars have, with remarkable accord, reached the same conclusion regarding the nature of control of the United States over the Continental Shelf.

In CSD 85–11 (referred to above) we ruled that 46 U.S.C. App. 292 applied to certain dredging on the outer Continental Shelf in support of oil and gas resource exploration operations. In our Case No. 109016, March 22, 1987, we ruled that the prohibition against dredging on the outer Continental Shelf extends only to those operations which are in furtherance of the extraction of or the exploration for, or the development or production of, resources from the outer Continental Shelf. The OCSLA does apply to the exploration for, development or production of *minerals*, in addition to petroleum related resources, from the outer Continental Shelf. Accordingly, we find that the described mining of the phosphate ore from the seabed of the outer Continental Shelf outside the territorial waters of the United States would constitute dredging in the United States for purposes of 46 U.S.C. App. 292. Therefore, the engagement of a for-

eign-built, United States-flag mining vessel or dredge for such exploration of phosphate ore would be prohibited.

Among navigation laws other than section 292 which Customs interprets and enforces is the so-called Jones Act (41 Stat. 999; 46 U.S.C. App. 883). This statute prohibits the transportation of merchandise between points in the United States embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any vessel other than a vessel built in and documented under the laws of the United States and owned by citizens of the United States (see also 46 U.S.C. App. 316a, the coastwise towing statute).

While we have held that the act of dredging is not, itself, deemed to be coastwise trade, we have consistently held that "merchandise" for the purpose of 46 U.S.C. App. 883, includes anything of commercial value. In applying this statute to the transportation of the mining resource exploited from the outer Continental Shelf to a coastwise port, we have consistently ruled that the use of a foreign vessel for such transportation would be prohibited under the statute. However, transportation of the mining resources by coastwise qualified barges and tugs would be permitted under the provisions of section 883 and 316(a).

In addition to the above cited statutes, your attention is directed to Presidential Proclamation 5030 of March 10, 1983, whereby the President of the United States proclaimed an Exclusive Economic Zone of the United States of America, and to the Deep Seabed Hard Mineral Resources Act (Public Law 96–283, 94 Stat. 553, 30 U.S.C. 1401 *et seq.*).

Holdings:

1. A foreign-built dredge documented in the United States may not engage in dredging in the United States.

2. The use of a foreign-built dredge documented as an American-flag vessel for mining for minerals, including phosphate ore, on the outer Continental Shelf is an engagement in dredging in the United States for the purposes of 46 U.S.C. App. 292.

3. The transportation of the dredged phosphate ore from a dredging site on the outer Continental Shelf to a United States port is coastwise transportation which may only be effected by coastwise qualified vessels.

Effect On Other Rulings:

None.

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 111

PROPOSED CUSTOMS REGULATIONS AMENDMENT REGARDING REQUIREMENTS FOR MAINTAINING CUSTOMS BROKERS LICENSES

AGENCY: Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations by requiring that all Customs brokers licenses issued after September 30, 1988, will be subject to a condition that the licensee must become qualified for the operational use of the Automated Broker Interface (ABI) portion of the Customs Automated Commercial System (ACS) within a reasonable time after receiving the license and that the licensee maintain such qualification. The document provides methods by which a licensee can demonstrate such ABI qualification. It also provides that all Customs brokers licensed after September 30, 1988, will be required to transmit the entry data elements on imported merchandise to Customs through the use of the Automated Broker Interface (ABI) portion of the Customs Automated Commercial System (ACS) prior to filing an entry/entry summary. The failure to meet these requirements would serve as a basis for revocation of such license. Conversion to this system would remain voluntary for brokers licensed before October 1, 1988, and all non-Customs broker entry filers. This change is necessary in order to better utilize ACS and to permit Customs to handle the anticipated increase in entry workload. It will allow entries to be processed quicker and merchandise released earlier. Customs will be able to more effectively and efficiently process cargo, deploy staff and discharge other functions than is possible with the current manual system.

DATE: Comments must be received on or before September 26, 1988.

ADDRESS: Comments (preferably in triplicate) may be addressed to and inspected at the Regulations & Disclosure Law Branch, Room

2324, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Robert Stenstrom, Office of Automated Commercial Systems Operations (202–343–0780).

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Automated Commercial System (ACS), inaugurated on February 1, 1984, is an integrated commercial system designed to handle a variety of needs for the importing community and Customs. It is a comprehensive tracking system which covers the various aspects of Customs commercial cargo activities. It permits a more efficient and effective processing of cargo, deployment of staff and the discharge of Customs functions than is possible with the current manual system. The selectivity part of ACS permits the targeting of high risk shipments and the examination of a lower percentage of freight with a resultant quicker release of cargo. The ACS line release system currently being deployed on both the northern and southern borders of the U.S. accelerates the release of low-risk repetitive shipments. ACS will also replace the current paper and labor intensive systems of tracking manifests with an Automated Manifest System (AMS). When fully integrated with the other modules of ACS, the AMS will eliminate the transmittal of paper manifests and it will automatically perform many of the clerical functions performed by Customs personnel.

The Automated Broker Interface (ABI) feature of ACS allows anyone who moves or releases cargo, makes entries, files protests, incurs penalties or has merchandise seized, pays or obtains refunds or duties, or conducts any other international business, to interface with ACS. Import trade processing requirements can be facilitated by using the interface to transmit entry data which can be preprocessed and returned to the entry filer.

There has been extensive participation in ABI by the trade. The number of Customs brokers qualified for operational use of the interface has significantly increased in the last two years. There are currently over 700 participants in the ABI program which are operationally qualified or are in the process of becoming operationally qualified.

In order to better utilize the system and to permit Customs to handle the anticipated significant increased volume of entries, it will be desirable for Customs to receive at least 90 percent of the entry volume data for pre-processing. The interface between the trade community and Customs will become even more critical with specialized situations, *e.g.*, quota processing, on-line tariff classification updating. We have thus concluded that the use of the ACS/ABI is very desirable to both the trade community and Customs.

PROPOSED ACTION

For the above reasons it is proposed to make the use of the ABI portion of the ACS mandatory for those brokers licensed after September 30, 1988. Customs brokers so licensed will be required to become qualified for the operational use of ABI within a reasonable time after the license is issued and to maintain such qualification. These brokers will be required to transmit the entry data elements on imported merchandise to Customs through the use of the Automated Broker Interface portion of the Automated Commercial System. The failure to meet these requirements would serve as a basis for revocation of the subject brokers licenses. Since Customs believes that commercial necessity will eventually dictate adoption of the ACS/ABI data handling procedures throughout the trade, brokers licensed before October 1, 1988, and all non-Customs broker entry filers would be permitted to voluntarily adopt the procedures as soon as they are prepared to do so.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4) and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations & Disclosure Law Branch, Room 2324, Csutoms Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) it is certified that, if adopted, the proposed amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

DRAFTING INFORMATION

The principal author of this document was Arnold L. Sarasky, Regulations & Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECT IN 19 CFR PART 111

Administrative practice and procedures, Brokers, Customs duties and inspection, Imports.

PROPOSED AMENDMENT

PART 111—CUSTOMS BROKERS

1. The authority citation for Part 111, Customs Regulations (19 CFR Part 111), would continue to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (Headnote 11), 1624, 1641.

2. It is proposed to amend Part 111 by adding a new § 111.20 to read as follows:

§ 111.20 ABI qualification requirements

Each Broker licensed after September 30, 1988, must establish, within a reasonable time after receiving a license, as determined by the district director, that he is qualified for the operational use of the Automated Broker Interface (ABI) portion of the Automated Commercial System (ACS) and he maintains that qualification. Being qualified means transmitting the entry data elements on imported merchandise to Customs through the interface in accord with ABI performance requirements and implementation procedures following Customs prescribed data element standards, data communications specifications and requisite hardware/software capabilities. However, brokers licensed after September 30, 1988, who work for another broker licensee or who file acceptable entries with Customs by utilizing a private service center, need not be individually ABI qualified.

3. It is proposed to revise § 111.53 by amending the introductory paragraph and adding a new paragraph (g) to read as follows:

§ 111.53 Grounds for suspension or revocation of license or permit or monetary penalty in lieu thereof.

The appropriate Customs official may suspend for a specific period of time, or revoke the license or permit of any broker or access a monetary penalty in lieu of suspension or revocation, for the following reasons:

* * * * * * *

(g) The broker was licensed after September 30, 1988, and fails either to (1) become qualified for the operational use of the Automated Broker Interface (ABI) portion of the Customs Automated Commercial System (ACS) within a reasonable time after receiving

his license, as determined by the district director, or (2) fails to maintain that qualification (see § 111.20).

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: June 24, 1988.

JOHN P. SIMPSON,
Acting Assistant Secretary (Enforcement).

[Published in the Federal Register, July 28, 1988 (53 FR 28413)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

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Edward D. Re

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Decisions of the United States Court of International Trade

(Slip Op. 88–77)

BORLEM, S.A. EMPREEDIMENTOS INDUSTRIAIS AND FNV VEICULOS E EQUIPAMENTOS S.A., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, THE BUDD CO., WHEEL AND BRAKE DIVISION, DEFENDANT-INTERVENOR

Court No. 87–06–00692

Before CARMAN, *Judge.*

[Plaintiff's motion granted in part; remand ordered.]

(Decided June 15, 1988)

Willkie Farr & Gallagher, (*William H. Barringer* and *James P. Durling* on the motion) for the plaintiff.

John R. Bolton, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, (*Platte B. Moring, III* on the motion) for the defendant.

Barnes, Richardson & Colburn, (*James H. Lundquist* and *Matthew J. Clark* on the motion) for the defendant-intervenor.

MEMORANDUM OPINION

CARMAN, *Judge:* Pursuant to Rule 56.1(a), plaintiff moves for judgment on the agency record, and in the alternative, judgment on the pleadings pursuant to Rule 12(c) of the Rules of this Court. Defendant-intervenor opposes the motion. A hearing was held on May 24, 1988.

FACTS

Pursuant to the directive of the Court at the time of oral argument, the parties consulted and stipulated to the following facts:

1. On May 23, 1986, the Department of Commerce (Commerce) received a petition filed on behalf of the Budd Company, Wheel and Brake Division, alleging that imports of tubeless steel disc wheels from Brazil were being, or were likely to be, sold in the United States at less than fair value and that such imports materially injured, or threatened material injury to, a United States industry.

2. On June 12, 1986, Commerce initiated an antidumping investigation to determine whether tubeless steel disc wheels from Brazil

were being, or were likely to be, sold in the United States at less than fiar value. 51 Fed. Reg. 21952 (June 17, 1986).

3. On December 19, 1986, Commerce issued a preliminary affirmative determination that imports of tubeless steel disc wheels from Brazil were being, or were likely to be, sold at less than fair value. 51 Fed. Reg. 46904 (Dec. 29, 1986).

4. In its preliminary determination, Commerce considered the date of shipment to the United States as the date of sale, comparing foreign market value on the date of shipment with U.S. price on the date of shipment. Commerce thus converted foreign market value into U.S. dollars at the exchange rate in effect on the date of shipment. 19 C.F.R. § 353.56(a).

5. Following its verification of the data provided by respondents, and its consideration of the arguments advanced by the parties at a public hearing and in their written submissions, Commerce issued a final affirmative determination of sales at less than fair value on March 13, 1987. 52 Fed. Reg. 8947 (Mar. 20, 1987).

6. In its final determination, Commerce calculated the U.S. price of the subject merchandise based on the purchase price of the merchandise sold, or offered for sale, to the United States. 19 U.S.C. § 1677a(b).

7. In its final determination, Commerce calculated foreign market value, in part, based on constructed value in the month of shipment to the United States. 19 U.S.C. § 1677b(e)(1)(A). Constructed value was calculated based upon the replacement cost of merchandise sold to the United States in the month of shipment to the United States.

8. For purposes of its fair value comparison, Commerce compared foreign market value on the date of shipment with U.S. price on the date of sale. In all instances the date of sale preceded the date of shipment. Foreign market values expressed in cruzeiros or cruzados were converted into U.S. dollars using the exchange rate in effect on the date of sale to the United States. 19 C.F.R. § 353.56(a). To explain its currency conversion in the preliminary determination, Commerce stated:

> At the time of our preliminary determination, a pattern of long time periods between reported dates of sale and shipment indicated the likelihood that date of shipment reflected the actual date of sale. However, verification has established that all elements necessary to constitute a sale were present at the sale dates reported.

52 Fed. Reg. at 8950.

9. On April 27, 1987, the U.S. International Trade Commission determined that an industry in the United States was threatened with material injury by reason of imports from Brazil of tubeless steel disc wheels. 52 Fed. Reg. 17487 (May 8, 1987).

10. Following issuance of the final affirmative determination by the U.S. International Trade Commission, Commerce issued an an-

tidumping duty order concerning tubeless steel disc wheels from Brazil. Included in that notice was an amendment to Commerce's final affirmative determination correcting a clerical error that appeared in the final determination. 52 Fed. Reg. 19903 (May 28, 1987).

11. On May 28, 1987, plaintiffs filed the summons in this action.

12. On June 18, 1987, plaintiffs filed the complaint in this action alleging, *inter alia*, that the conversion of foreign market value into dollars using an exchange rate other than that in effect on the date when foreign market value was computed resulted in less than fair value margins that were "not supported by substantial evidence and not in accordance with law."

13. On August 24, 1987, defendants answered Count 1 of plaintiffs' complaint and admitted in paragraph 26 of their answer that "the dumping margins are not supported by substantial evidence on the record and are otherwise not in accordance with law," but denied all other allegations of error in the complaint.

14. On September 11, 1987, defendant-intervenor answered plaintiffs' complaint denying, *inter alia*, the allegation that the margins published by Commerce were not supported by substantial evidence or otherwise not in accordance with the law.

15. On December 17, 1987, defendants amended their answer to the complaint to admit in paragraph 50 of their answer the existence of specified clerical, calculational, and transcription errors.

16. On January 29, 1988, plaintiffs filed alternative motions for judgment on the pleadings, pursuant to Rule 12(c), or for judgment on the administrative record, pursuant to Rule 56.1(a).

17. On March 14, 1988, defendants filed a memorandum concerning plaintiffs' alternative motions. Defendants disagreed with plaintiffs' reasoning in their memorandum, but requested nonetheless that the Court grant plaintiffs' motion for judgment on the pleadings and remand this action for reconsideration by Commerce with respect to Count 1 of the complaint. Defendants also requested remand for correction of the errors admitted in paragraph 50 of the amended answer.

18. On March 14, 1988, defendant-intervenor filed a memorandum in opposition to plaintiffs' alternative motions, requesting that the Court deny those motions.

Discussion

Plaintiff and defendant have requested that Counts II, III, IV, V and VI of the complaint be dismissed without prejudice. Defendant has asked for a remand to correct clerical errors and to reconsider its determination.

Defendant-intervenor opposes the remand.

This Court holds as follows:

Plaintiffs's motion for judgment upon the pleadings and, in the alternative, judgment upon the agency record be, and is hereby

granted to the extent that this action is remanded to the Department of Commerce as to Counts I and VII of the complaint to recalculate the antidumping duty margin and to correct all clerical, calculation and transcription errors in *Tubeless Steel Disc Wheels from Brazil*, 52 Fed. Reg. 8947 (March 20, 1987), as amended 52 Fed. Reg. 19903 (May 28, 1987). Counts II, III, IV, V and VI are dismissed without prejudice to renew. The Department of Commerce will publish a new determination within 60 days of this memorandum and order bearing even date herewith.

(Slip Op. 88–78)

F.W. MYERS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84–02–00261

Before CARMAN, *Judge.*

[Customs classification of subject merchandise under TSUS item 692.35 reversed and remanded.]

(Decided June 16, 1988)

Ross & Hardies (*Joseph S. Kaplan*) on the motion) for the plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, United States Department of Justice, Commercial Litigation Branch (*Michael P. Maxwell* on the motion) for the defendant.

MEMORANDUM OPINION

CARMAN, *Judge:* Plaintiff challenges the United States Customs Service (Customs) classification of its merchandise as "tractors" under item 692.35 of the Tariff Schedules of the United States [TSUS]. The merchandise was assessed duty at a rate of 4.3% *ad valorem* in 1982 and 3.9% *ad valorem* in 1983. Plaintiff contends the merchandise should be classified under TSUS item 692.11 as Canadian motor vehicles for the transport of persons or articles. In the alternative, plaintiff urges that the merchandise should be classified under TSUS item 692.34 as tractors suitable for agricultural use. Under either provision, the merchandise would qualify for duty-free status. As this case concerns the denial of a protest pursuant to section 515 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1515 (1982), jurisdiction is predicated upon 28 U.S.C. § 1581(a) (1982).

After considering the evidence presented including the testimony of witnesses at the trial, the Court determines the common meaning of the term "tractor," as urged by plaintiff, to be a motor vehicle used primarily for pushing or pulling an appliance or load. Since the plaintiff has shown that the primary function of its merchandise is for transporting persons or articles and not for pushing or pulling an appliance or load, the Court finds that Customs incor-

rectly classified the merchandise as "tractors," under TSUS item 692.35. The Court further finds that the merchandise should have been classified under the heading of "motor vehicles for the transport of persons or articles" under TSUS item 692.11. Because there is insufficient evidence from which to conclude that the merchandise is "Canadian," for the purpose of item 692.11, however, the Court remands this action to Customs for further investigation.

FACTS

Plaintiff, F.W. Myers, Inc., is a licensed Customshouse Broker and the importer of record of the subject merchandise. The merchandise is identified as Bombardier BR–200 vehicles, which are self-propelled, track type all-terrain vehicles. The vehicles were manufactured by Bombardier, Inc., of Canada (Bombardier) and purchased by Utility Equipment Company, Inc. (Utility), a domestic company engaged in the sale and servicing of equipment to electric power companies. The vehicles were resold to the United States Department of Energy, Bonneville Power Administration (BPA) of Vancouver, Washington.

The BR–200 vehicles were built by Bonbardier in accordance with detailed specifications of the BPA. *See* Plaintiff's Exhibit 1, *F.W. Myers, Inc.* v. *United States* (No. 84–02–00261) [PX 1]. The specifications require the vehciles to operate for long distances over rough terrain in snow, brush, and mud and on BPA access roads to maintain electric transmission lines and microwave and radio stations. *Id.* at 1. The specifications require the vehicles to be capable of transporting men, tools, and materials to these off-road work sites. Transcript at 18, *F.W. Myers, Inc.* v. *United States,* (No. 84–02–00261) [Transcript]. The vehicles have roll over protection designed to prevent the crushing of operators during any type of roll-over. PX 1, *supra,* at 4. The vehicles must be capable of turning within their own length. They must operate on a slope of approximately 39 degrees, traverse a firm dirt incline of approximately 27 degrees, and have a ground pressure of not more than 1.1 pounds per square inch. *Id.* at 3. Some of the vehicles are equipped with a trailer hitch of a type used for recreational or light commercial trailers. Transcript, *supra,* at 30. All vehicles are equipped with a mechanical or hydraulic winch. PX 1, *supra,* at 6.

The general design of the BR–200 consists of an engine and drive train to propel the vehicle, a cab for passengers and a transporting trailer for equipment and materials, tracks for flotation and trac-

tion in snow and mud, and a chassis on which to mount the other components. A reproduction of the vehicle is shown below:

Joint Exhibit 2A, *F.W. Myers, Inc.* v. *United States* (No. 84–02–00261).

Customs classified the vehicles as "tractors" under TSUS item 692.35 which provides in pertinent part:

> Tractors * * * whether or not equipped with power take-offs, winches, or pulleys, and parts of such tractors:
>
> * * * * * * *
>
> 692.35 Other .....4.3% *ad valorem* (1982)[1]
> 3.9% *ad valorem* (1983)[2]

Plaintiff contends the BR–200 vehicles should have been classified as motor vehicles for the transport of persons or articles under TSUS item 692.11 which provides in relevant part:

> Motor vehicles (except motorcycles) for the transport of persons or articles:

[1] As modified by Pres. Proc. 4707.
[2] *Id.*

* * * * * * *

Other

* * * * * * *

If Canadian article, but not including any three-wheeled vehicle (see general headnote 3(e) ..... Free

General Headnote 3(e) supplies a definition for the term "Canadian article:"

(ii) The term "Canadian article," as used in the schedules, means an article which is the product of Canada, but does not include any article produced with the use of materials imported into Canada which are products of any foreign country * * * if the aggregate value of such imported materials * * * was—

* * * * * * *

(B) more than 50 per cent of the appraised value of the article imported into the customs territory of the United States.

As an alternative claim, plaintiff maintains the imported vehicles should have been classified as tractors suitable for agricultural use under item 692.34, TSUS. This section provides in pertinent part:

Tractors * * * whether or not equipped with power take-offs, winches, or pulleys, and parts of such tractors:

Tractors suitable for agricultural use, and parts thereof ..... Free

DISCUSSION

At the outset, it is important to note that a classification by Customs is presumed to be correct, and the party challenging the decision bears the burden of proving that the classification is incorrect. 28 U.S.C. § 2639(a)(1) (1982); *Jarvis Clark Co.* v. *United States,* 2 Fed. Cir. (T) 70, 72, 733 F.2d 873, 876 (1984), *reh'g denied,* 2 Fed. Cir. (T) 97, 739 F.2d 628 (1984). The party challenging the classification need not establish that its proposed classification is correct. The reviewing Court must ascertain the correct classification by determining "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark,* 2 Fed. Cir. (T) at 75, 733 F.2d at 878. In addition, "the [Court of International Trade] * * * may order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision." 28 U.S.C. § 2643(b) (1982).

A. *Common Meaning of "tractor"*

While the term "tractor" is not defined in the TSUS, it is well settled that tariff acts must be construed to carry out the intent of the legislature. *Nippon Kogaku (USA), Inc.* v. *United States,* 69 CCPA 89, 92, 673 F.2d 380, 382 (1982). A tariff term is construed in accord-

ance with the common and commercial meanings which are presumed to be the same. *Id.* It is further presumed that Congress knows the language of commerce and has framed a tariff term according to the general usage and denominations of trade. *Nylos Trading Company* v. *United States,* 37 CCPA 71, 73, C.A.D. 422 (1949).

The common meaning of a tariff term is a question of law to be determined by the Court. The Court may consult dictionaries, scientific authorities, and other reliable sources of information to ascertain this meaning. *C.J. Tower & Sons of Buffalo, Inc.* v. *United States,* 69 CCPA 128, 133, 673 F.2d 1268, 1271 (1982); *Schott Optical Glass, Inc.* v. *United States,* 82 Cust. Ct. 11, 16, C.D. 4783, 468 F. Supp. 1318, 1321 (1979), *aff'd,* 67 CCPA 32, 34, C.A.D. 1239, 612 F.2d 1283, 1285 (1979).

Plaintiff contends that the common or dictionary meaning of "tractor" is a motor vehicle used primarily for pushing or pulling an appliance or load. Because the BR–200 vehicles are used primarily for transporting persons or articles, plaintiff maintains that the vehicles should not be classified as "tractors" within the meaning of the TSUS. The defendant, on the other hand, urges that a broader meaning of a "tractor" should be applied because a "tractor" may be used for many purposes.

In the search for the common meaning of the *eo nomine* provision for tractor, the Court has consulted several definitions, the first of which provides as follows:

> A wheeled, self-propelled vehicle for hauling other vehicles or equipment and for operating the towed implements; also, a crawler which runs on an endless, self-laid track and performs similar functions.

18 McGraw-Hill Encyclopedia of Science & Technology 449 (1987). Tractor is further defined as:

> an apparatus or device for the draft or sometimes propulsion of another body: as * * * (b)(1): a 4-wheeled or caterpillar-tread rider-controlled automotive vehicle used esp. for drawing agricultural or other implements or for bearing and propelling such implements * * *.

Webster's Third New International Dictionary 2421 (1981).

Crawlers or track-type tractors are characterized as those "used primarily for earthmoving * * *. Field operating speed is relatively slow * * * which limits their use to pulling extremely heavy loads or to work on steep slopes." 26 Encyclopedia Americana 907 (1973). The definition provided by 16 Collier's Encyclopedia 650 (1979) is as follows:

> The tractor, as classified here, is a motor vehicle especially suited to farm construction work. It may carry its own tools for working the ground, or for other services, or it may serve to haul mechanical devices, wagons, and trailers.

Id. Based on the foregoing definitions, the Court finds the dictionary and encyclopedia sources neither refute nor clearly establish the proposition that the primary characteristic of a tractor is the facility for pushing and pulling an appliance or load.

The Court therefore turns to the testimony given at the trial of the instant action. While testimony may serve as an aid in understanding the common meaning of a term, such testimony is not conclusive or binding on the Court. Testimony can be accorded such weight as the Court deems proper. *Toyota Motor Sales, U.S.A., Inc.* v. *United States,* 7 CIT 178, 183–84, 585 F.Supp. 649, 654 (1984), *aff'd* 3 Fed. Cir. (T) 93, 753 F.2d 1061 (1985); *Tropical Craft Corp.* v. *United States,* 45 CCPA 59, 61 C.A.D. 673 (1958). With regard to the determination of the common meaning of the term "tractor," the Court finds the testimony to be conflicting, tentative, and generally not helpful in determining whether a broad or narrow common meaning attaches to the term "tractor." The mere fact that several of the witnesses used the term "tractor" to describe the BR–200 is not dispositive of the common meaning.

When a word has both a broad and narrow common meaning, it is proper to refer to the legislative history, administrative practice, sections related to those in which the term appeared, and other "external aids." *Sears, Roebuck & Co.* v. *United States,* 26 CCPA 161, 167, C.A.D. 11 (1938) (citing *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 317–19 (1933)). One such legislative reference is the *Tariff Classification Study* which in Schedule 6, Part 6 (1960) provides as follows:

> Item 692.30 would put on a sounder basis the existing treatment of tractors as agricultural implements under paragraph 1604 of the free list of the Tariff Act of 1930. In recent years, practically all imports of tractors have been admitted free under paragraph 1604. *Tractors are mobile power units used for many purposes, including agricultural, construction, road building, etc.* Attempts to distinguish so-called agricultural-type tractors from types chiefly used for non-agricultural purposes necessarily involve unrealistic distinctions. For years it was the practice to classify as agricultural implements only so-called wheel-type tractors. Within recent months a so-called half-tread tractor, said to be of special design for agricultural purposes, was held to be free as an agricultural implement. Item 692.30 would change the present "chief use" concept implicit in paragraph 1604 by providing for tractors "suitable for agricultural use."

Id. at 325 (emphasis added). Defendant contends this passage supports its contention that a broader meaning of "tractor" should be applied because a tractor may be used for many purposes. While this passage confirms that a tractor may be used for many purposes and provides a "suitability" test for agricultural usage, the passage is not helpful for the purpose of determining whether the descrip-

tive meaning of a tractor, even in a non-agricultural context, is or is not limited primarily to pushing or pulling an appliance or load.

The Court therefore consults the explanation contained within the *Nomenclature for the Classification of Goods in Customs Tariffs,* commonly known as the "Brussels Nomenclature." The Brussels Nomenclature is considered a highly probative source for ascertaining legislative intent especially where the language and phraseology of the TSUS and Brussels Nomenclature are similar. *See, e.g., United States* v. *Abbey Rents,* 66 CCPA 2, 4, n.5, C.A.D. 1213, 585 F.2d 501, 504 n.5 (1978); *Schwarz* v. *United States,* 57 CCPA 19, C.A.D. 971, 417 F.2d 1391 (1969). *See also Tariff Classification Study, Submitting Report* 8 (1960). (The Brussels Nomenclature was one of the two classification systems which exerted the greatest influence on the arrangement of the proposed revised tariff schedules). The Brussels Nomenclature is a useful source of legislative history with respect to the tariff schedules when a nexus is established between the two sources by the utilization of identical or similar phraseology. *Mattel, Inc.* v. *United States,* 65 Cust. Ct. 616, 625, C.D. 4147 (1970). *See also Toyota Motor Sales,* 7 CIT at 185, 585 F. Supp. at 656. Heading 87–01 of the Brussels Nomenclature provides as follows:

> —TRACTORS (OTHER THAN THOSE FALLING WITHIN HEADING NO. 87.07), WHETHER OR NOT FITTED WITH POWER TAKE-OFFS, WINCHES OR PULLEYS (+).

For the purposes of comparison, the term "tractor" under the TSUS provides as follows:

> Tractors (except tractors in item 692.40 and except automobile truck tractors), whether or not equipped with power take-offs, winches or pulleys, and parts of such tractors.

The Court finds that the language and phraseology pertaining to the term tractor is sufficiently similar to establish a nexus between the two sources. The explanatory note to heading 87–01 of the Brussels Nomenclature further provides:

> For the purposes of this heading, tractors are deemed to be wheeled or tracked vehicles constructed solely or essentially for hauling or pushing another vehicle, appliance or load. They may contain subsidiary provision for the transport, in connection with the main use of the tractor, of tools, seeds, fertilisers or other goods, or provision for fitting with working tools as a subsidiary function.

The explanation attached to the term "tractor" in the Brussels Nomenclature therefore favors the more limited common meaning asserted by the plaintiff, that is, that a tractor is a wheeled or tracked vehicle constructed solely or essentially for hauling or pushing another vehicle, appliance, or load.

It is also helpful to refer to the administrative practice to assist in determining the common meaning of a tariff term. The United

States Court of Appeals for the Federal Circuit has held that "[a]lthough an agency's interpretation of the statute under which it operates is entitled to some deference, 'this deference is constrained by [the] obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history.'" *Al Tech Specialty Steel Corp.* v. *United States*, 3 Fed. Cir. (T) 1, 13, 745 F.2d 632, 642 (1984) (quoting *Southeastern Community College* v. *Davis*, 442 U.S. 397, 411, (1979)). In T.D. 85–192, 19 Cust. Bull. 456, 461 (1985), Customs reasoned that the subject merchandise, identified as a "Unimog," was not an automobile truck but was a "tractor" because it lacked the essential physical characteristics for transporting goods, and its design was primarily suitable for pushing and pulling an appliance or load. Customs further commented:

> The term "tractor" is commonly known to be a vehicle which is designed to push or pull an appliance or load. It is not a vehicle designed primarily for transporting of articles, although it may be suitable for limited use in transporting articles.

Id. at 461. Although Customs determined that the merchandise was not a tractor suitable for agricultural purposes, Customs classified the merchandise as a "tractor" because of its primary function of pushing and pulling an appliance or load. The explanation given by Customs in T.D. 85–192, albeit dicta, therefore supports the narrow definition of "tractor" asserted by plaintiff and is consistent with the explanatory note to the Brussels Nomenclature. The Court is therefore persuaded that the more correct common meaning of "tractor" is a motor vehicle primarily used for pushing and pulling an appliance or load.

B. *Classification of Multifunction Articles*

It is well established that where merchandise has a single or primary function and an incidental, subordinate, or secondary function, the merchandise is classifiable on the basis of its primary design, construction, or function. *Carling Elec. Co.* v. *United States*, 7 CIT 303, 310, 592 F. Supp. 667, 672 (1984), *aff'd*, 3 Fed. Cir. (T) 109, 757 F.2d 1285 (1985) (citing *Trans-Atlantic Company* v. *United States*, 60 CCPA 100, 103, C.A.D. 1032, 471 F.2d 1397, 1399 (1973)). The question of whether a given function is secondary or coequal is one of fact. *ASEA, Inc.* v. *United States*, 7 CIT 128, 131, 587 F. Supp. 1072, 1073–74 (1984), *aff'd*, 3 Fed. Cir. (T) 35, 748 F.2d 676 (1984); *Tridon, Inc.* v. *United States*, 5 CIT 167, 169 (1983).

The evidence on record persuasively shows that the primary function or chief use of the BR–200 is to transport persons or articles, *see* Transcript, *supra*, at 18, 29, 35, 52, 68–69, and that the BR–200 has an incidental or subordinate function of pulling or pushing an appliance or load such as a trailer to the work site. *Id.* at 22, 30, 31, 35. The mere fact that the BR–200 has a tractor chassis and runs on treads is not controlling. The BR–200 is designed to meet the specification for a minimal cargo capacity of 18–20 square feet and a to-

tal payload capacity, including passengers, equipment, and materials of at least 1400 pounds. PX 1, *supra*, at 2–3. This cargo capacity is essential for carrying the people, tools, and repair materials to the work sites. Transcript, *supra*, at 29. In addition, some of the BR–200 vehicles as imported are equipped with a hitch, some are not. *Id.* at 40. The record indicates that the hitch attached to some of the BR–200 vehicles is a ball hitch not used primarily for hauling, but for tying down the vehicle while it is being loaded. *Id.* at 51. Moreover, the type of hitch attached to the BR–200 is not suitable for towing snow grooming equipment because it lacks the necessary support to hold the down load of the grooming equipment. *Id.* at 31–32. With respect to the winch, the BR–200 may be equipped with an electric or hydraulic winch. Either type of winch is used primarily for vehicle recovery, that is, to allow the crew to extricate the vehicle from a "stuck" condition. *Id.* at 32.

Accordingly, the Court finds that the BR–200 is used primarily for transporting persons and articles and that it has an auxiliary, incidental, and subordinate function of pushing or pulling an appliance or load. An analogous example of this principle is an automobile or truck attached with a trailer to its hitch. The automobile or truck maintains its primary function of transporting people and articles even though it may also incidentally haul a trailer or boat. Therefore, the Court holds that the presumption of correctness which ordinarily attaches to a Customs ruling has been overcome in this case. Since the Court finds that the BR–200 is not a "tractor" within the common meaning of that term, it is not necessary to address plaintiff's alternative claim that the BR–200 is classifiable as a tractor suitable for agricultural use.

With regard to the proper classification of the BR–200, the Court holds that the BR–200 vehicles should be classified under TSUS item 692.11 as "motor vehicles for the transport of persons or articles."

Because there is insufficient evidence on record to establish that the BR–200 is a "Canadian article" for the purpose of TSUS item 692.11, however, the Court remands this action to Customs for further investigation as to the Canadian identity of the subject merchandise. So ORDERED.

(Slip Op. 88–79)

PHONE-MATE, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 86–11–01449

Before RE, *Chief Judge.*

MEMORANDUM OPINION AND ORDER

The Customs Service classified imported combination telephone and answering machine devices as "[t]elephone sets and other terminal equipment and parts thereof," under item 684.58, TSUS. The plaintiff contests the classification, and claims that the merchandise is properly classifiable under item 688.41, TSUS, as "[o]ther: [a]rticles designed for connection to telegraphic or telephonic apparatus or instruments or to telegraphic or telephonic networks." Plaintiff and defendant move for summary judgment.

Held: The court concludes that there are no material issues of fact in dispute. Since the Customs Service properly classified the imported merchandise as "[t]elephone sets and other terminal equipment and parts thereof," under item 684.58, TSUS, plaintiff's motion for summary judgment is denied, and defendant's cross-motion for summary judgment is granted.

[Plaintiff's motion for summary jugement is denied; defendant's cross-motion for summary judgment granted.]

(Dated June 17, 1988)

Glad & Ferguson (*Edward N. Glad*), for plaintiff.

John R. Bolton, Assistant Attorney General; *Joseph I. Liebman*, Attorney In Charge, International Trade Field Office, Commercial Litigation Branch (*Susan Handler-Menahem*), for defendant.

RE, *Chief Judge:* The question presented in this case pertains to the proper classification, for customs duty purposes, of certain combination telephone and answering machine devices imported from Japan and described on the customs invoice as "other terminal equipment."

The merchandise entered at the port of Los Angeles, California in 1986, and was classified by the Customs Service as "[t]elephone sets and other terminal equipment and parts thereof," under item 684.58 of the Tariff Schedules of the United States (TSUS). Consequently, the merchandise was assessed with duty at the rate of 8.5 per centum *ad valorem*.

Plaintiff protests this classification, and contends that the imported merchandise should properly be classified under item 688.41, TSUS, as "[o]ther: [a]rticles designed for connection to telegraphic or telephonic apparatus or instruments or to telegraphic or telephonic networks." If the merchandise is properly classifiable under item 688.41, TSUS, as maintained by plaintiff, it would be dutiable at the lower rate of 4.1 per centum *ad valorem*.

In its complaint, plaintiff claimed alternative classifications under item 685.39, TSUS, as "[t]elephone answering machines, and parts thereof," or under item 688.42, TSUS, as "[o]ther: [a]rticles designed for connection to telegraphic or telephonic apparatus or instruments or to telegraphic or telephonic networks * * * [o]ther," or under item 676.30, TSUS, as "[o]ffice machines not specially provided for." In its brief, however, plaintiff did not pursue any of these claims, and requested classification only under item 688.41, TSUS. Hence, the alternative claims are deemed abandoned.

The imported merchandise consists of combination devices, designated as models 8050 and 9550, which contain a telephone, an answering and recording machine, and a digital clock. Plaintiff con-

tends that, as a combination article with the two distinct functions of a telephone and an answering machine, the merchandise cannot properly be described by the heading "[t]elephone sets and other terminal equipment and parts thereof." Hence, the court must determine whether the provision "[t]elephone sets and other terminal equipment and parts thereof," as used in item 684.58, TSUS, includes combination telephone and answering machine devices. Since neither party discusses the digital clock, it is evident that the clock is incidental to the merchandise, and is therefore not in issue.

The pertinent statutory provisions of the tariff schedules are as follows:

Classified Under:

Schedule 6, Part 5:

Electrical telegraph (including printing and type-writing) and telephone apparatus and instruments, and parts thereof:

Telephonic apparatus and instruments and parts thereof:

* * * * * * *

684.58 Telephone sets and other terminal equipment and parts thereof ..... 8.5% *ad val.*

Claimed Under:

Schedule 6, Part 5:

Electrical articles and electrical parts of articles, not specially provided for:

* * * * * * *

Other:

688.41 Articles designed for connection to telegraphic or telephonic apparatus or instruments or to telegraphic or telephonic networks ..... 4.1% *ad val.*

The question presented is whether the imported merchandise has been properly classified by Customs as "[t]elephone sets and other terminal equipment and parts thereof" under item 684.58, TSUS, or whether it is properly classifiable as "[o]ther: [a]rticles designed for connection to telegraphic or telephonic apparatus or instruments or to telegraphic or telephonic networks," under 688.41, TSUS, as contended by plaintiff.

In order to decide this question, the court must consider "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co.* v. *United States,* 733 F.2d 873, 878, *reh'g denied,* 739 F.2d 628 (Fed. Cir. 1984). Pursuant to 28 U.S.C. § 2639(a)(1) (1982), the government's classification is presumed to be correct and the burden of

proof is upon the party challenging the decision. *See Jarvis Clark Co.*, 733 F.2d at 876.

Contending that there are no material issues of fact in dispute, both parties moved for summary judgment pursuant to Rule 56 of the Rules of this Court. Upon examining the tariff schedules, relevant case law, and supporting papers, the court concludes that there are no material issues of fact in dispute, and that the imported merchandise has been properly classified. Hence, plaintiff's motion for summary judgment is denied, and defendant's cross-motion for summary judgment is granted.

On a motion for summary judgment, it is the function of the court to determine whether there are any factual disputes that are material to the resolution of the action. *See Heyman* v. *Commerce and Indus. Ins. Co.*, 524 F.2d 1317, 1319–20 (2d Cir. 1975). The court may not resolve or try factual issues on a motion for summary judgment. *Yamaha Int'l Corp.* v. *United States*, 3 CIT 108, 109 (1982). In ruling on cross-motions for summary judgment, if there are no genuine issues of material fact, the court must decide whether either party has demonstrated its entitlement to judgment as a matter of law. *See American Motorists Ins. Co.* v. *United States*, 5 CIT 33, 36 (1983).

In support of its motion, plaintiff maintains that in order to be included in the inferior heading for item 684.58, TSUS, the merchandise must be included within the superior heading, which provides for "[e]lectrical telegraph * * * and telephone apparatus and instruments, and parts thereof." Plaintiff contends that the telephone answering machine component of the merchandise does not fall within the meaning of that heading, as intended by Congress. Furthermore, plaintiff submits that if Congress considered telephone answering machines to be "telephone apparatus and instruments," it would have placed the provision for answering machines under that heading rather than in item 685.39, TSUS, under the heading which provides:

> Radiotelegraphic and radiotelephonic transmission and reception apparatus; radiobroadcasting and television transmission and reception apparatus, and television cameras; record players, phonographs, tape recorders, dictation recording and transcribing machines, record changers, and tone arms; all of the foregoing, and any combination thereof, whether or not incorporating clocks or other timing apparatus, and parts thereof:
>
> * * * * * * *
>
> 685.39 Telephone answering machines, and parts thereof.....4.1% *ad val.*

In addition, plaintiff contends that the telephone and telephone answering machine components have separate and independent commercial functions, and, therefore, the merchandise is "more than" either item of the combination.

In opposition to plaintiff's motion, defendant maintains that the legislative history of item 684.58, TSUS, shows that the provision for "telephone sets and other terminal equipment" includes merchandise which combines a telephone and an answering machine in one unit. Defendant contends that under the Trade and Tariff Act of 1984, which established and added item 684.58, TSUS, Congress intended that the provision for "[t]elephone sets and other terminal equipment and parts thereof," should be sufficiently broad to encompass new technology in the area of telecommunications.

It is evident from the submissions that there is no material issue of fact in dispute. Plaintiff describes the merchandise as consisting "in part of a telephone answering machine and in part of a built-in telephone." Defendant describes the merchandise as consisting of "a combination of a telephone and answering machine." Hence, regardless of phraseology, both parties agree that the importation is a combination article. The parties are in disagreement, however, as to whether item 684.58, TSUS, encompasses or provides for a combination telephone and answering machine device.

Whether the imported merchandise is within the meaning of "telephone sets and other terminal equipment" is a matter of law and not an issue of fact. *See Fanon Elec. Indus., Inc.* v. *United States,* 65 Cust. Ct. 542, 545, C.D. 4135 (1970). As with other statutory provisions, it is the function of the court to interpret the tariff acts in a manner that will fulfill or carry out the intent of Congress. *See Sandoz Chem. Works, Inc.* v. *United States,* 43 CCPA 152, 156, C.A.D. 623 (1956).

The initial source for the determination of congressional intent is the specific language of the tariff provision, which is to be given its common or commercial meaning. *See Ameliotex, Inc.* v. *United States,* 65 CCPA 22, 25, C.A.D. 1200, 565 F.2d 674, 677 (1977). When the court is confronted with conflicting interpretations of a tariff provision, and there is doubt or ambiguity, it is proper to resort to legislative history, committee reports and other pertinent extrinsic aids. *See United States* v. *Kung Chen Fur Corp.,* 38 CCPA 107, 117–18, C.A.D. 447 (1951); *see also Schott Optical Glass, Inc.* v. *United States,* 82 Cust. Ct. 11, 16, C.A.D. 1239, *aff'd,* 612 F.2d 1283 (1979).

The language of item 684.58, TSUS, "[t]elephone sets and other terminal equipment and parts thereof," does not resolve the question presented, nor does it offer specific guidance in ascertaining the meaning and scope of that tariff item. Nevertheless, it is beyond question that the tariff statutes were enacted "not only for the present but also for the future, thereby embracing articles produced by technologies which may not have been employed or known to commerce at the time of the enactment * * *." *Corporation Sublistatica S.A.* v. *United States,* 1 CIT 120, 126, 511 F. Supp. 805, 809 (1981).

Since item 684.58, TSUS, was added to the tariff schedules in 1984, pursuant to the Trade and Tariff Act of 1984, Pub. L. No. 98–573, 98 Stat. 2948, defendant urges that it is pertinent to examine the House Conference Report which discusses section 124 of the Act (Telecommunications product classification). That report states that the Senate bill "[r]evises the provisions of the Tariff Schedules applicable to telecommunications products, without changes in rates of duty, in order to better reflect the state of current technology in such products in the TSUS." H.R. Conf. Rep. No. 1156, 98th Cong., 2d Sess. 106 (1984).

The nomenclature in the original bill was drafted by the United States International Trade Commission (ITC) and was introduced to the Senate on May 1, 1984 as Title II of the Telecommunications Trade Act of 1984. Defendant points out that subsequent changes were made by the Senate Trade Subcommittee with the assistance of the ITC which submitted a report to the Senate Committee on Finance. That report, entitled *Changes in the U.S. Telecommunications Industry and the Impact on U.S. Telecommunications Trade,* discusses customer premises equipment (CPE), which it defines as encompassing "all types of switching, transmission and termination apparatus." USITC Publication 1542, at 3 (June 1984). The report also describes CPE as consisting "principally of terminal equipment (i.e., telephone instruments) * * *." *Id.* at ix. The report states that "[t]erminal equipment is sometimes used to describe customer premises equipment. Such usage, however, connotes too narrow a range of apparatus which is now found outside the telephone or common carriers' facilities." *Id.* at 3 n. 2.

In discussing CPE the report states that "[a]ll other types of wire-connected telephone instruments *whether or not in combination with other products* such as radios, calculators, cigarette lighters and tape recorders are also included." *Id.* at 3 (emphasis added). Hence, the defendant contends, that the ITC, which drafted the relevant tariff provisions, intended the phrase "telephone sets and terminal equipment" to embrace many combination instruments, including answering and recording machines combined with telephones. Although the report does not specifically define telephone sets or terminal equipment, it is evident from the language used by the ITC that, in light of current telecommunications technology, it considers the term telephone to have a broad enough scope to include articles which combine a telephone with other instruments or devices.

The Nomenclature for the Classification of Goods in Customs Tariffs, generally referred to as the Brussels Nomenclature, sheds considerable light on the meaning and scope of the pertinent tariff provision. The Brussels Nomenclature has been recognized as "a highly probative source for ascertaining legislative intent especially where the language of the TSUS and Brussels are similar." *See Toyota Motor Sales, U.S.A., Inc.* v. *United States,* 7 CIT 178, 185, 585 F. Supp.

649, 655 (1984), *aff'd*, 753 F.2d 1061 (Fed. Cir. 1985). In order to utilize the Brussels Nomenclature and its Explanatory Notes, there must be a nexus between the language of the Brussels provision and that of its counterpart provision in the TSUS. *Id.* at 185, 585 F. Supp. at 655–56.

As may be noted by a comparison of the Brussels provision with that of item 684.58, TSUS, in this case, the necessary nexus is clearly present. *See, e.g., Herbert G. Schwartz, dba Ski Imports* v. *United States*, 57 CCPA 19, 22–23, C.A.D. 971, 417 F.2d 1391, 1393–94 (1969). In Section XVI, the Brussels provision states:

> 85.13——Electrical line telephone and telegraphic apparatus (including such apparatus for carrier-current line systems).

The Explanatory Notes to Heading 85.13 provide in part:

> The present heading covers *all kinds of telephone sets* including those in which a telephone set (incorporating a selector and a hand set) *and a device for the transmission of recorded messages* and, sometimes, the recording of incoming calls *constitute an integrated unit.* (emphasis added)

As may be noted, the Brussels Explanatory Notes for Heading 85.13 specifically state that the heading covers "all kinds of telephone sets" including those with a telephone answering machine. Since it is also stated that the described telephone sets "constitute an integrated unit," it would seem clear that the imported telephone and answering machine devices are included in the Brussels provision. This conclusion, of course, supports the defendant's contention that the imported merchandise is included in item 684.58, TSUS, as "[t]elephone sets and other terminal equipment and parts thereof," and that it has been classified correctly by Customs.

Plaintiff also contends that the imported merchandise is not classifiable under item 684.58, TSUS, because answering machines are provided for elsewhere in the tariff schedules under item 685.39. This contention in this case is without merit. The fact that answering machines, are provided for in item 685.39 of the tariff schedules, merely indicates that telephone answering machines, when they are imported separately, are classifiable under that provision. It does not change the fact that telephone answering machines, when they are imported combined with telephones, "constitute an integrated unit," and as a combined unit are classifiable under item 684.58, TSUS.

Plaintiff, nevertheless, contends that the imported merchandise is "more than" telephone sets and other terminal equipment. Plaintiff argues that the answering machine does not perform a function incidental to that of the telephone, but rather, performs a separate and independent commercial function. In support of its motion, plaintiff submits the affidavit of its director of operations, David R. Reed. Based on his personal knowledge, Mr. Reed avers that "when the built-in telephone in Models 8050 and 9550 is in use, the tele-

phone answering component of those models is not in use. Conversely, the telephone answering machine component * * * is only in use when the built-in telephone is not being used."

Defendant, on the other hand, contends that "[t]he two functions of the unit are related and merely provided for alternative methods of receiving the telephone message * * *. All of the functions of the unit are related to the essential character of the telephone set."

To determine whether the imported articles are "more than" telephone sets and other terminal equipment, it is necessary to determine the meaning of the tariff provision involved and compare it with the merchandise in issue. *See E. Green & Son, Inc.* v. *United States,* 59 CCPA 31, 34, C.A.D. 1032, 450 F.2d 1396, 1398 (1971); *B & E Sales Co.* v. *United States,* 9 CIT 69, 72 (1985). Accordingly, a finding, by the court, that an article is "more than" that described by the tariff provision signifies, in effect, that the provision cannot be interpreted as covering that article. *See The Englishtown Corp.* v. *United States,* 64 CCPA 84, 87, C.A.D. 1187, 553 F.2d 1258, 1260 (1977). The court has examined the legislative history of item 684.58, TSUS, and has ascertained that the statutory intent of that provision clearly is to include articles which combine a telephone and answering machine in one unit. Hence, the merchandise is properly classifiable as "[t]elephone sets and other terminal equipment and parts thereof," under item 684.58, TSUS.

It is not questioned that an article which in fact constitutes more than a particular article or which has additional primary or coequal functions is not classifiable under the provision for that article. *See A & A Int'l, Inc.* v. *United States,* 10 CIT ——, 676 F. Supp. 263, 269 (1987). In this case, however, it seems clear that the answering machine serves a secondary function which relates to the predominant use of the article as a means of transmitting and receiving telephonic messages.

Finally, plaintiff contends that the imported merchandise was not properly classified because, pursuant to the Tariff Classification Study of 1960, prepared by the United States Tariff Commission, "electrical telegraph and telephone apparatus and instruments" transmit sounds by "the variation of an electric current flowing in a circuit connecting the transmitting station to the receiving station." Plaintiff asserts that the answering machine component does not vary any electric current. This contention does not affect the customs classification question presented, since the imported merchandise is not a telephone answering machine, but rather, a combination article consisting of *a telephone* and an answering machine.

Plaintiff has offered insufficient evidence to support its contention that the merchandise is properly classifiable under item 688.41, TSUS, as "[o]ther [a]rticles designed for connection to telegraphic or telephonic apparatus or instruments or to telegraphic or telephonic networks." An examination of the evidence leaves no doubt that the imported articles contain a telephone and, therefore,

are not designed for connection to telephonic apparatus. Since the court finds no support for this claimed classification, no further discussion is necessary.

Hence, it is the holding of the court that there are no material issues of fact in dispute. The court also holds that plaintiff has failed to rebut the presumption of correctness that attaches to the classification of the merchandise by the Customs Service, and that the merchandise was properly classified as "[t]elephone sets and other terminal equipment and parts thereof," under items 684.58, TSUS. Accordingly, plaintiff's motion for summary judgment is denied, and defendant's cross-motion for summary judgment is granted.

(Slip Op. 88–80)

OLYMPIC ADHESIVES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83–10–01441

Before MUSGRAVE, *Judge.*

OPINION AND ORDER

[Plaintiff's Motion to Preclude Expansion of the Administrative Record Affirmed in Part; Denied in Part.]

(Decided June 17, 1988)

Sharrets, Paley, Carter & Blauvelt, P.C. (*Gail T. Cumins*) for the plaintiff.

John R. Bolton, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*J. Kevin Horgan*) for defendant.

BACKGROUND

MUSGRAVE, *Judge:* On September 9, 1985 the Commerce Department, International Trade Administration (ITA) published its Final Results of an Administrative Review of an Antidumping Finding on Animal Glue and Inedible Gelatin from Sweden, 48 Fed. Reg. 40769–70. The administrative record from that review was originally filed with the Court on January 5, 1984. On April 25, 1985 plaintiff filed a Rule 56.1 Motion for Review Upon the Administrative Record. Defendant subsequently realized, in reviewing the record, that certain documents had not been included in the record previously filed. On May 16, 1985 defendant sent to the Court two documents for insertion in the administrative record. Plaintiff moves to exclude these two documents from the record.

DISCUSSION

19 U.S.C. 1516a(b)(2)(A) states what shall be included in the record for review in an antidumping action.

(2) Record for review—

(A) In general—For purposes of this subsection, unless otherwise stipulated by the parties, shall consist of—

(i) a copy of all information presented to or obtained by the Secretary, the administering authority, or the Commission during the course of the administrative proceedings, including all governmental memoranda pertaining to the case and the record of ex parte meetings * * * and

(ii) a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.

In *PPG Industries, Inc.* v. *U.S.*, 5 CIT 282 (1983) this Court clearly stated that the administrative record for review in an antidumping action

> "consists of all information presented to or obtained by the Authority during the course of the proceeding and includes all government memoranda presented to the person responsible for making a determination, or on which such person relied in making the determination.
>
> Thus, any data or memoranda not presented to, obtained by, considered or relied upon by the [the authority] * * * are not part of the record * * *"

The first document which plaintiff seeks to exclude is a questionnaire response originally submitted by Extraco, A.B., the exporter of the animal glue, during the course of a previous administrative review of a dumping finding covering animal glue from Sweden. On the first page of this document is a handwritten note. Plaintiff alleges that the note neither identifies the author nor the date of notation and contends that because the document is not properly authenticated it should not be place in the record. Defendant, however, points out that the document, including the note, is referred to in a memorandum prepared by the case analyst who conducted the administrative review which is the subject of this action. This memo appears in the record originally filed with the Court, and indicates that the document in question, as well as the note, were relied upon by the case analyst during the course of the proceeding. Plaintiff does not dispute this contention. Thus, as defendant points out, while plaintiff's objection may have some bearing on the evidentiary weight to be accorded the document, it does not serve as a basis for excluding it from the record. *See*, § 1516a(b)(2)(A)(i).

The second document in question is a memorandum dated September 26, 1983 from an ITA case handler. The determination under review consists of a decision published in the Federal Register on September 9, 1983 (48 Fed. Reg. 40769–70). Plaintiff correctly contends that as a matter of law, this memorandum cannot be placed in the record as it could not have been presented to or obtained by the Authority during the course of the proceeding. De-

fendant does not object to the exclusion of this memorandum from the administrative record.

Defendant does object, however, to the exclusion of the attachments to the memorandum, alleging that all but one of the attachments appear elsewhere in the record already, and that all of the attachments were presented to or obtained by the agency during the administrative proceeding. This clearly provides a sufficient basis for the inclusion of these attachments in the administrative record. *See,* 19 U.S.C. § 1516a(b)(2)(A).

Plaintiff does not dispute that all but one of the attachments appears in the record, and with respect to the one which does not, makes the unsubstantiated statement that it "quite possibly was never made available toi [sic] the actual decision maker in this case." In short, plaintiff presents no real argument for the exclusion of the attachments to the second document in question from the record.

CONCLUSION

In accordance with 19 U.S.C. 1516a(b)(2)(A) and this Court's decision in *PPG Industries,* supra, Plaintiff's Motion to Preclude Expansion of the Administrative Record is denied with respect to the first document in question. As to the second document in question, Plaintiff's motion is affirmed with respect to the document itself, but denied with respect to the attachments to that document.

(Slip Op. 88–81)

NAKAJIMA ALL CO., LTD., AND NAKAJIMA U.S.A., INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, SMITH-CORONA CORP., DEFENDANT-INTERVENOR.

Court No. 88–02–00079

Before CARMAN, *Judge.*

[Plaintiff's request for writ of mandamus granted.]

(Decided June 22, 1988)

McDermott, Will & Emery, (R. Sarah Compton and Kurt J. Olson, on the motions and the briefs; *Patrick J. Cumberland* on the briefs), for the plaintiffs.

Patton, Boggs & Blow, (Michael D. Esch, on the motions) of counsel for the plaintiffs.

John R. Bolton, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, (*M. Martha Ries,* on the motions); and Office of the Chief Counsel for International Trade, U.S. Department of Commerce (*Lisa B. Koteen,* of counsel on the motions) for the defendant.

Stewart and Stewart, (Eugene L. Stewart, Terence P. Stewart, and *James R. Cannon, Jr.,* on the motions and the briefs) for the defendant-intervenor.

Memorandum Opinion and Order

Carman, *Judge:* Plaintiffs filed their action requesting, *inter alia,* a writ of mandamus to be issued directing the defendant, United States Department of Commerce, International Trade Administration (Commerce), to complete and publish the results of various preliminary and final administrative § 751 reviews (751 reviews) pursuant to § 751 of the Tariff Act of 1930, as amended by the Trade and Tariff Act of 1984, 19 U.S.C. § 1675 (1987). The 751 reviews at issue are four separate reviews covering the following time periods: 5/1/82 – 4/30/83 (Q4); 5/1/83 – 4/30/84 (Q5); 5/1/84 – 4/30/85 (Q6); and 5/1/85–4/30/86 (Q7). The reviews at issue covered Commerce's antidumping investigation of portable electric typewriters (PETs) from Japan.

On the return date, February 11, 1988, in open court, the Court directed the defendant to propose a schedule as to when the various section 751 reviews would be completed, directed the parties to confer and submit to the Court a proposed stipulation of facts, and continued the hearing until February 19, 1988. On February 19, 1988, in open court, the Court reserved its decision on plaintiffs' action for a writ of mandamus and continued the case with certain requirements. *See Nakajima All Co., Ltd.* v. *United States,* —— CIT ——,——, 682 F. Supp. 52, 60 (1988), *appeal docketed,* No. 88–1430 (Fed. Cir. May 19, 1988). After further delays, Commerce published the preliminary results of the 751 reviews at issue (Q4–Q7) on June 3, 1988. The Court now exercises its continued jurisdiction over the matter and directs Commerce to complete the final results of the 751 reviews, Q4–Q7, by October 15, 1988.

Facts

Plaintiffs Nakajima All Co., Ltd. and Nakajima U.S.A., Inc. (plaintiffs) filed this action for a writ of mandamus directing Commerce to complete and publish four preliminary and final 751 administrative review results regarding Commerce's antidumping investigation of portable electric typewriters from Japan. Plaintiffs also filed a motion for an order to show cause why this action should not be expedited. Plaintiffs shortly thereafter withdrew their motion for an accelerated discovery and a trial *de novo.*

At issue are four annual 751 reviews of an antidumping investigation and order concerning portable electric typewriters (PETS) produced and exported from Japan. The antidumping order has been in effect since May of 1980. Commerce has conducted eight 751 reviews since the order, completing and publishing the preliminary and final results of only the first three. The 751 reviews at issue (the fourth, fifth, sixth and seventh) involve sales covering the years 1982 through 1986. The parties submitted to the Court a proposed stipulation of facts concerning the several 751 reviews at issue. The Court notes those facts as well as the Court's further recitation of

other relevant events are set forth in *Nakajima All,* 682 F. Supp 52 and need not be further repeated.

The Court issued its Slip Opinion and Order, *Nakajima All, id.,* on March 3, 1988. The Court, in its Order, directed the parties to submit periodic status reports concerning the proceedings involved with the completion of the preliminary results. The Court also directed the parties to appear periodically before the Court to address the status of the proceedings.

Defendant, in its status reports, complained to the Court of the burden it perceived Commerce had to bear in completing the status reports and conferring with counsel pursuant to those chores. Plaintiff continued to complain of the delays in the completion of the review results and repeatedly requested the Court to issue a writ of mandamus to compel Commerce to complete the preliminry and final results of the 751 reviews.

On May 26, the Court held a telephone conference with all the parties concerning the status of the case. Noting defendant's dissatisfaction with the Court's order of March 3, 1988,[1] the Court observed:

> [The Court] was under the impression that this proceeding that had been adopted or this procedure that had been adopted was designed to be helpful to the government, the amicus and to the plaintiffs. And, it is in that context that [the Court] adopted this particular procedure with what [the Court] anticipated was to be the cooperation of counsel on all sides in order to expedite the Department of Commerce's ability to get these proceedings completed.
>
> Suffice it to say, [the Court] will not permit the Court to be the administrative agency nor is the Court interested in being involved in impeding the administrative process.

Transcript of Telephone Conference at 11, May 26, 1988, *Nakajima All* (Transcript). The Court concluded with the following:

> In addition to that, insofar as the order coming from the Slip Op. dated March 3, 1988 is concerned, the Court will vacate the requirement for various status reports and leave standing in regard to that order, its reservation as to whether or not a mandamus, writ of mandamus, should issue. Other than that, the rest of the portion of that order will continue and, the Court will continue to maintain jurisdiction over this proceeding as it unfolds.

Id. at 14.

The Court granted amici curiae its motion to intervene and granted defendant-intervenor opportunity to file any additional comments with the Court. The Court, as stated above, reconsidered whether or not a mandamus should issue and decided, in light of

[1] Defendant filed an appeal of the Court's Order of March 3, 1988 to the Court of Appeals for the Federal Circuit on May 19, 1988. Defendant also filed a motion for stay pending appeal on May 25, 1988. Since the Court vacated, in part, its Order concerning those issues appealed, the Court denied defendant's motion on June 20, 1988 in furtherance of the Court's concern to avoid further delays.

the high probability the May 31, 1988 completion date was firm, the writ of mandamus would not issue as to the preliminary review results from Q4–Q7. The Court also vacated the Courts's order inclusive in the *Nakajima All* opinion but left standing the reservation on whether or not a writ of mandamus should issue. The Court ordered the rest of that order would continue as would the Court's jurisdiction over the action.

On June 3, 1988, Commerce published the preliminary results of its administrative reviews of Q4–Q7. *Portable Electric Typewriters From Japan,* 53 Fed. Reg. 20353 (June 3, 1988). Commerce, in the published results, included the following statement:

> Interested parties may request disclosure and/or an administrative protective order within 5 days of the date of publication of this notice and may request a hearing within 8 days of publication. Any hearing, if requested, will be held 35 days after the date of publication or the first workday thereafter. Prehearing briefs and/or written comments from interested parties may be submitted Not [sic] later than 25 days after the date of publication. Rebuttal briefs are rebuttals to written comments, limited to issues raised in those comments, may be filed not later than 32 days after the date of publication. The Department will publish the final results of the administrative review, including the results of its analysis of any such comments or hearing.

Discussion

The Court's jurisdiciton to hear this action and decide whether or not to issue a writ of mandamus has been set forth at length in the Court's opinion in *Nakjima All,* 682 F. Supp. 52 (1988), and need not be set forth here.

Although mandamus has been recognized as an extraordinary remedy, the Court has authority to provide this remedy pursuant to 28 U.S.C. §§ 1585, 1651(a) and 2643(c)(1). *See Sharp Corp.* v. *United States,* 837 F.2d 1058 (Fed. Cir. 1988). The Court observes the issuance of a writ of mandamus is: "an extraordinary equitable remedy which should be employed to compel the performance of a ministerial duty specifically enjoined by law where performance has been refused, and no meaningful alternative remed[y] exist[s]." *UST. Inc.* v. *United States,* —— *CIT* ——, ——, *648 F. Supp. 1, 5 (1986); aff'd on other grounds,* 831 F.2d 1028 (Fed. Cir. 1987). Unreasonable delays in the agency performance of ministerial duties may also constitute sufficient basis for a writ of mandamus to issue. *See Id.; Matsushita Electric Industrial Co., Ltd.* v. *United States,* —— CIT ——, Slip Op. 88–66 (May 25, 1988), notice of appeal filed (CIT June 13, 1988).

An agency has a certain amount of statutory discretion in the way it conducts its affairs, procedures, and investigations. A reviewing court, when confronted with a petitioner's challenge to an agen-

cy action, must exercise a certain amount of prudence and restraint in dictating how an agency must perform.

Nevertheless, where an agency has a statutory timeframe within which to carry out those functions, it is incumbent upon the reviewing court to insure the agency complies with those requirements in a timely manner. Regardless of the fact that the statutory mandate of Congress setting forth a timeframe is mandatory or directory, the Court has a duty "to determine 'whether the agency's delay is so egregious as to warrant mandamus.' " *Sierra Club* v. *Thomas*, 828 F.2d 783, 797 (D.C. Cir. 1987) (citation and footnote omitted).

The court, in *Sierra Club*, made its observations in a case where the agency had a statutory duty to avoid "unreasonable delay." Although that is not the exact situation in the instant action,[2] the findings of the court in *Sierra Club* provide important analogous instruction for the Court's review of Commerce's delays in publishing the preliminary and final results of its 751 reviews.

The court, in *Sierra Club*, was guided by the following in its review of the agency's delay:

> It is well established that, in conducting this review, "[t]he reasonableness of the delay must be judged 'in the context of the statute' which authorizes the agency's action." In particular, if, as in this case, the claim is that the agency's delay deprives the petitioner of a statutory right to timely decisionmaking [sic], then we look to see whether Congress has imposed any applicable deadlines or otherwise exhorted swift deliberation concerning the matter before us or whether the statutory scheme implicitly contemplates timely final action; whether interests other than that of timely decisionmaking [sic] will be prejudiced by delay; and whether an order expediting the proceedings will adversely affect the agency in addressing matters of a competing or higher priority. When we assess these factors, we must remember that, "[a]bsent a precise statutory timetable or other factors counseling expeditious action, an agency's control over the timetable of a rulemaking [sic] proceeding is entitled to considerable deference."

Id. at 828 F.2d 797. (footnotes omitted).

It has been recognized in a few cases that the timetable for completion of § 751 reviews is directory and not mandatory because Congress did not provide for a prohibition or adverse consequence to be imposed for failing to meet the statutory deadline. *See Philipp Bros. Inc.* v. *United States*, —— CIT ——, ——, 630 F. Supp. 1317, 1323 (1986), *appeal dismissed*, No. 86–1122 (Fed. Cir. July 18, 1986); *American Permac, Inc.* v. *United States*, —— CIT ——, ——, 642 F. Supp. 1187, 1191–92 (1986). These cases, though, are distinguishable from the case at bar since the court in *Philipp Bros.* and *American Permac* was faced with petitioners' request to impose penalties, in

[2] Although the administrative review statute, 19 U.S.C. § 1675, does not employ the words "unreasonable delay", Congress was explicit in setting forth the 12-month timeframe in which Commerce "shall review and determine * * * and shall publish the results of such review * * *." 19 U.S.C.A. § 1675(a)(1) (1987) (in pertinent part).

the form of liquidation, on Commerce for failing to comply with the statutory deadlines.

In *Philipp Bros.*, the court was petitioned to find the merchandise at issue liquidated by operation of law, 19 U.S.C. § 1504(a), when the time period of suspension of the liquidation of the merchandise extended beyond the twelve-month time limit for the § 751 review. Plaintiffs, in *Philipp Bros.*, argued the suspension automatically terminated at the end of the twelve-month period allowed for the 751 review and, therefore, the merchandise should have been liquidated. The Court, in its analysis, concluded:

> there is nothing in the statute or legislative history that compels the conclusion that the implied suspension automatically terminates at the close of the twelve-month period specified in section 751. *Thus, in this situation, the court is unable to conclude that the statute imposes a penalty of deemed liquidation for the delay.* Although ITA's failure to comply with the statutory time limit is not condoned by this court, this failure to act in a timely manner did not deprive ITA of jurisdiction to complete the section 751 review.

Philipp Bros., 630 F. Supp. at 1324 (emphasis added and footnote omitted).

The court, in *American Permac*, was faced with a similar challenge to Commerce's actions under 19 U.S.C. § 1504(d). Section 1504(d) provided that any entry not liquidated after four years from the entry date or withdrawal from warehouse date is deemed liquidated at the initial assessed amount unless liquidation is under suspension by statute or court order. The court stated:

> In this case, the ITA did not publish its review determination until over four years after the latest entry date covered by the review. Plaintiffs do not dispute that the pendency of the § 1675(a) review necessitated an extension of the liquidation period beyond the one-year deadline specified in § 1504(a). They contend, however, that there was no lawful basis for an extension or suspension beyond the four-year limit under § 1504(d). Plaintiffs assert that there was no statutory authority for a suspension beyond that limit; and since defendant failed to seek a court ordered suspension, the entries should have been deemed liquidated after four years.

American Permac, 642 F. Supp. at 1190.

The court concluded:

> The "deemed liquidated" penalty of § 1504 operates irrationally, and if applied in an antidumping context could lead to particularly inequitable assessments, since the amount of deposited duties may bear little relation to actual dumping margins. In that situation it would seem especially critical that parties be guaranteed an adequate means to challenge the basis of the assessments. The scheme for judicial review of agency determinations under the new law, if applicable at all, is ill-suited to that purpose. Congress' failure to address this difficulty, cou-

> pled with its clearly expressed expectation tht periodic review determinations would provide the basis for antidumping duty assessments on covered entries, persuades the court that Congress intended the statutory suspension of liquidation during a periodic review to override the possibility of deemed liquidation under § 1504(d).
>
> The court, of course, does not condone the ITA's failure to meet its statutory time limits. However, the availability of an action to enforce those time limits accords adequate protection to parties who are truly aggrieved by undue agency delays.

Id. at 1197 (footnote omitted).

The Court finds, from the analysis in *Philipp Bros.* and *American Permac,* the directory or mandatory nature of the statute is important for the Court to consider when a court is petitioned to hold merchandise deemed liquidated (*i.e.,* in the nature of a penalty) where Commerce does not meet the twelve-month deadline under 19 U.S.C. § 1675(a)(1). Such is not the case at bar and does not appear to affect plaintiffs' petition here.

The Court, in the instant action, is not asked to liquidate merchandise or penalize Commerce, but to compel Commerce to complete the 751 reviews after undue delays of up to five years. The Court is asked to exercise its statutory authority to enforce the statute and, therefore, compel Commerce to "reasonably" comply with its statutory deadline of twelve-months. *Brock* v. *Pierce County,* 476 U.S. 253 (1986);[3] *Nakajima All,* 682 F. Supp. at 57; *UST, Inc.,* 648 F. Supp. at 4; *American Permac,* 642 F. Supp. at 1192 ("that remedy (judicial action to enforce the statutory deadline) clearly would be available to participants in ITA review proceedings where the ITA exceeds the publication deadline, by virtue of this court's jurisdiction under 28 U.S.C. § 1581(i)(4)"). This "reasonable" compliance translates to directing Commerce to complete its 751 review proceedings of Q4–Q7 before the delays in completion extend to a point encompassing a length of time beyond *three to six years.*

The Court of Appeals for the Federal Circuit has recognized the Court has the authority to exercise its sound discretion to fashion an appropriate remedy in compelling Commerce to complete the processing of ongoing administrative reviews in appropriate circumstances. *Sharp Corp.* v. *United States,* 837 F.2d 1058 (Fed. Cir. 1988). The Court has previously exercised this authority when Commerce has delayed conducting 751 reviews for over four years. *Matsushita*

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[3] The Court, in *Pierce County,* undertook to interpret Section 106(b) of the Comprehensive Employment and Training Act (CETA), 29 U.S.C. § 816(b) which "provides that the Secretary of Labor * * * 'shall' issue a final determination within 120 days * * *. The question presented in [*Pierce County* was] whether the Secretary loses the power to recover misused CETA funds after that 120-day period has expired." *Pierce County,* 476 U.S. at 254–55. The Court observed:

> We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline,' courts should not assume that Congress intended the agency to lose its power to act.

Id. at 260. The Court, in footnote 7, suggested a complainant may ask for a less drastic remedy by bringing an action in court challenging the Secretary's failure to act by lengthy delays. The court would then "have the authority to 'compel agency action * * * unreasonably delayed.'" *Id.* at n.7.

Here, the plaintiff is asking for a "less drastic remedy" by compelling the agency to act when it has unreasonably delayed completion of the Q4–Q7 reviews for a period of two–five years. The Court seeks not for Commerce "to lose its power to act," but rather to encourage Commerce to utilize that power to act in a more alacritous manner.

Electric Industrial Co., Slip Op. 88–66 at 20–21 (where the court found a delay of four years in the administration of 751 reviews to warrant compelling Commerce to complete the reviews by the certain date.)

The Court, notwithstanding these observations, recognizes the burdens expressed by defendant that Commerce has experienced in completing the reviews with being understaffed, receiving less than adequate funds, and experiencing other shortcomings commonly recognized in the administration of federal agency duties. This Court is not unsympathetic to this encumbrance. Nevertheless, these problems do not control in the agency's requirement to meet the statutory mandates legislated by Congress in 19 U.S.C. § 1675. If these problems are retarding the administration of Commerce's duties to such an extent as is present in this case, then it would seem imperative to voice these concerns to Congress.

The delay in completing the administrative reviews of Q4–Q7 extending back to April 18, 1983 is of sufficient concern to the Court and of equally great prejudice to plaintiffs to warrent a writ of mandamus issue.

The statute, § 1675, presents a clearly discernible timetable imposed by Congress concerning the completion of the reviews. Although this Court has recognized Commerce's discretion in carrying out its functions, Commerce is not immune from court supervision, pursuant to § 1581(i)(4), especially when executing its functions unreasonably, arbitrarily, or in a manner contrary to law.

Plaintiff is prejudiced by these undue delays. Not only is plaintiff denied any semblance of a timely made decision, but has incurred financial burdens of lost sales volume due to the added cost of deposit rates and other opportunity costs connected with restricted resources. The public interest is also prejudiced by the impediment to the free flow of commerce caused by these inordinate delays.

In addition, the issuance of the mandamus will not have an adverse affect on Commerce's ability to "address matters of a competing or higher authority." Commerce has completed the preliminary results and is in the process of receiving comments and briefs on the preliminary results on a certain time schedule encompassing thirty-five days after the publishing of those results. Notwithstanding these dates, Commerce did not set a date certain for the completion of the final results. This reluctance to publish a date or even indicate an estimated completion date concerns the Court.

The Court, in its continued jurisdiction of this case, has the authority to insure the completion of the final results of Q4–Q7 will not fall victim to the same circumstantial delays surrounding the completion of the preliminary results of Q4–Q7.

Therefore, in accordance with the Court's option, Commerce is directed to complete and publish the final results of the 751 reviews of Q4–Q7, covering the time periods May 1, 1982 to April 30, 1986 by October 15, 1988.

This Court's order will be entered accordingly.

(Slip Op. 88–82)

FORMER EMPLOYEES OF BASS ENTERPRISES PRODUCTION, CO., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 87–04–00584

Before DiCARLO, *Judge.*

Orders from United States Court of International Trade remanding an action to the United States Department of Labor for further proceedings are not final orders. Motion for stay to contemplate an appeal is denied.

[Defendant's motion for stay denied.]

(Decided June 28, 1988)

Charles E. Williams, pro se, for plaintiffs.

John R. Bolton, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Elizabeth C. Seastrum*); United States Department of Labor (*Gary Bernstecker*), for defendant.

DiCARLO, *Judge:* Defendant moves for an order suspending all proceedings in this action for 60 days from the Court's order entered June 2, 1988. On that date, the Court ordered the United States Department of Labor (Labor) to prepare and issue a final determination consistent with *Former Employees of Bass Enterprises Prod. Co.* v. *United States,* 12 CIT ——, Slip Op. 88–68 (May 27, 1988), which vacated and remanded Labor's denial of trade adjustment assistance benefits after finding that Labor denied plaintiffs their due process in not giving actual notice of the 10-day period in which to request a hearing on the petition for adjustment assistance.

Defendant states that it makes its motion because the government is considering whether to file a notice of appeal from Slip Op. 88–68. Defendant states that "the Government is allowed sixty days in which to file a notice of appeal because the decision-making process may be time consuming. 28 U.S.C. § 2107." Defendant's Motion at 1.

DISCUSSION

Slip Op. 88–68 vacated and remanded this action to Labor for further proceedings. The order on June 2, 1988 defined the scope of those further proceedings and ordered Labor to report back its results to the Court.

The United States Court of Appeals for the Federal Circuit has jurisdiction over appeals from final decisions of the United States Court of International Trade. 28 U.S.C. § 1295(a)(5) (1982). An order is generally final only when it ends the litigation on the merits and leaves nothing for the court to do but execute judgment. *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 467 (1978). It is well established that an order remanding a case to the agency from which it has been appealed is not a final order for the purposes of appellate review, even though the order may resolve an important legal issue.

Cabot Corp. v. *United States*, 4 Fed. Cir. (T) 80, 82, 788, F.2d 1539, 1542 (1986); *Hameetman* v. *City of Chicago*, 776 F.2d 636, 640 (7th Cir. 1985); *In re Riggsby*, 745 F.2d 1153, 1156 (7th Cir. 1984). As the Supreme Court has explained, this final judgment rule:

> helps preserve the respect due trial judges by minimizing appellate-court interference with the numerous decisions they must make in the prejudgment stages of litigation. It reduces the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals. It is crucial to the efficient administration of justice.

Flanagan v. *United States*, 465 U.S. 259, 263–64 (1984).

One statutory exception to the final judgment rule allows a judge of the Court of International Trade to certify an order for appeal which the Court of Appeals for the Federal Circuit may then allow in its discretion. 29 U.S.C. § 1292(d)(1) (1982); *Cabot Corp.*, 4 Fed. Cir. (T) at 83, 788 F.2d at 1543. The order must include a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(d)(1) (1982). Defendant has not moved for such an order.

Conclusion

This Court's orders remanding to Labor for further proceedings are not final orders. Defendant's motion for a stay of the administrative proceedings while it contemplates an appeal is denied.

(Slip Op. 88–83)

RSI (India) Pvt., Ltd., et al., plaintiffs *v.* United States, defendant, and Pinkerton Foundry, Inc., et al., defendant-intervenors

Court No. 87-01-00086

Before DiCarlo, *Judge.*

[Plaintiffs' motion for rehearing denied.]

(Decided June 30, 1988)

Brownstein, Zeidman & Schomer (*Irwin P. Altschuler, Denise T. DePersio, David R. Amerine,* and *Ronald M. Wisla*), and *Kaplan, Russin & Vecchi* (*Dennis James, Jr.* and *Kathleen Patterson*) for plaintiffs.

John R. Bolton, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, United States Department of Justice (*Elizabeth C. Seastrum*); United States Department of Commerce (*Mark J. Sadoff*) for defendant.

Collier, Shannon, Rill & Scott (*Paul C. Rosenthal, Carol A. Mitchell* and *Robin H. Beeckman*) for defendant-intervenors.

DiCARLO, *Judge:* Indian exporters and United States importers of iron-metal construction castings from India (plaintiffs) move under Rule 59 of the Rules of this Court for a rehearing of *RSI (India) Pvt., Ltd.* v. *United States*, 12 CIT ——, Slip Op. 88–49 (Apr. 27, 1988), which affirmed the determination of the International Trade Administration of the United States Department of Commerce (Commerce) to countervail the entire amount of International Price Reimbursement Scheme (IPRS) payments.

Plaintiffs submit that the Court (1) "misapplied" 19 U.S.C. § 1677(6) to reach its holding that Commerce lawfully countervailed the IPRS payments in full and (2) neglected to consider Commerce's duty to conduct a thorough investigation. Plaintiffs raise no challenge to the portions of the opinion concening the calculation of the net benefit of the IPRS payments to RSI (India) Pvt., Ltd. or the calculation of the interest rate benchmark for packing credit loans.

DISCUSSION

The granting of a motion for rehearing is within the sound discretion of the court. *Quigley & Manard, Inc.* v. *United States*, 61 CCPA 65, 67, C.A.D. 1121, 496 F.2d 1214, 1214 (1974); *Commonwealth Oil Ref. Co.* v. *United States*, 60 CCPA 162, 166, C.A.D. 1105, 480 F.2d 1352, 1355 (1973). The purpose of a rehearing is not to relitigate a case. *BMT Commodity Corp.* v. *United States*, 11 CIT ——, 674 F. Supp. 868, 869 (1987). A rehearing is a method of rectifying a significant flaw in the conduct or the original proceeding. *W.J. Byrnes & Co.* v. *United States*, 68 Cust. Ct. 358, 358, C.R.D. 72–5 (1972). The exceptional circumstances for granting a motion for rehearing are well established:

> (1) an error or irregularity in the trial; (2) a serious evidentiary flaw; (3) a discovery of important new evidence which was not available at the time of trial; or (4) an occurrence at trial in the nature of an accident or an unpredictable surprise or unavoidable mistake which impaired a party's ability to adequately present its case.

North Am. Foreign Trading Corp. v. *United States*, 9 CIT 80, 80, 607 F. Supp. 1471, 1473 (1985), *aff'd*, 4 Fed. Cir. (T) 43, 783 F.2d 1031 (1986); *Oak Laminates d/o Oak Materials Group* v. *United States*, 8 CIT 300, 302, 601 F. Supp. 1031, 1033 (1984), *aff'd*, 4 Fed. Cir. (T) 43, 783 F.2d 195 (1986); *V.G. Nahrgang Co.* v. *United States*, 6 CIT 210, 211 (1983). In ruling on a petition for rehearing, a court's previous decision will not be disturbed unless it is "manifestly erroneous." *United States* v. *Gold Mountain Coffee, Ltd.*, 9 CIT 77, 78 (1985);

United States v. *Gold Mountain Coffee, Ltd.*, 8 CIT 336, 336–37, 601 F. Supp. 212, 214 (1984).

I

Plaintiffs submit that the Court's decision is "fundamentally flawed" because the Court "misapplied" Congress' definition of "net subsidy" in 19 U.S.C. § 1677(6) (1982). The reference to the statute appeared only in the Court's survey of the entire statutory scheme as an aid to correctly apply the countervailing duty laws:

> Under the countervailing duty laws, a subsidy has the same meaning as the term "bounty or grant" and is defined to include a government's provision of goods at preferential rates and a government's assumption of any costs or expenses of manufacture or production. 19 U.S.C. § 1677(5)(B)(ii) and (iv) (1982). The countervailing duty law requires that the amount of any countervailing duty imposed on foreign merchandise be "equal to the net amount of such bounty or grant, however the same be paid or bestowed." 19 U.S.C. § 1303(a) (1982). Although the phrase "net amount" is undefined, *see* S. Rep. No. 249, 1st Sess. 85, *reprinted in* 1979 U.S. Code Cong. & Admin. News 471, the countervailing duty law also requires the amount of a duty imposed to be "equal to the amount of the net subsidy." 19 U.S.C. § 1671(a) (Supp. IV 1986). To determine the "net subsidy," Congress has directed Commerce to subtract from the gross subsidy the amount of
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> > (A) any application fee, deposit, or similar payment paid in order to qualify for, or to receive, the benefit of the subsidy,
> >
> > (B) any loss in the value of the subsidy resulting from its deferred receipt, if the referral is mandated by Government order, and
> >
> > (C) export taxes, duties, or other charges levied on the export of merchandise to the United States specifically intended to offset the subsidy received.
>
> 19 U.S.C. § 1677(6) (1982). These three items do not expressly include the non-excessive portion of rebates as an adjustment to the amounts of a gross subsidy, and the legislative history of this provision shows that Congress intended this list to be narrowly drawn and all inclusive. S. Rep. No. 249, 96th Cong., 1st Sess. 86, *reprinted in* 1979 U.S. Code Cong. & Admin. News 472.

RSI (India) Pvt., Ltd., 12 CIT at ——, Slip Op. 88–49, at 11–12.

Contrary to plaintiffs' assertions, the Court did not "misapply" 19 U.S.C. § 1677(6) (1982) because the Court's citation to that section did not control the disposition of any of plaintiffs' claims.

The Court affirmed Commerce's determination to countervail IPRS payments in full. Commerce had found that because the formula used to calculate payments was fatally flawed in the absence of any relationship between the amount of IPRS payments and actual pig iron consumption and in the absence of a true world mar-

ket price for pig iron. In rejecting plaintiffs' claims, the Court found the Indian government's IPRS payments worked to provide materials on terms more favorable than those commercially available on world markets and was thus a countervailable subsidy under paragraph (d) of the Illustrative List of Export Subsidies annexed to the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 513, 546, T.I.A.S. 9619, 55 U.N.T.S. 194 (the GATT Subsidies Code), as incorporated into the United States Code, 19 U.S.C. §§ 1677(5)(A), 2502(1), and 2503(c)(5) (1982). The Court also found there was insufficient evidence to support plaintiffs' claim that IPRS payments were the functional equivalent of a duty drawback scheme, and that in the absence of any controls normally associated with a duty drawback program, Commerce acted reasonably in determining that it could not determine whether IPRS payments functioned as duty drawback.

The Court's reference to 19 U.S.C. § 1677(6) is only to show that the Court examined all the statutory provisions and legislative history pertaining to the identification and quantification of subsidies in a vain attempt to find support for plaintiffs' claims. The fact that the Court examined the statutory provisions relating to gross as well as net subsidies is not a ground for granting a rehearing.

2

Plaintiffs also submit that the Court neglected to consider Commerce's duty to conduct a thorough investigation.

To the extent the thoroughness of Commerce's investigation was never directly at issue, the Court does not consider arguments raised for the first time on rehearing when the moving party had a prior opportunity to adequately make its position known. *Gold Mountain Coffee,* 8 CIT at 337, 601 F. Supp. at 214. Furthermore, "[a]s long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A.* v. *United States,* 10 CIT ——, 636 F. Supp. 961, 966 (1986), *aff'd,* 810 F.2d 1137 (Fed. Cir. 1987).

The Court did consider the scope of Commerce's investigation as well as the adequacy of the evidence which Commerce had gathered in its investigation and assembled in the administrative record. *RSI (India) Pvt., Ltd.,* 12 CIT at ——, Slip Op. 88–49 at 13–14. Plaintiffs' dissatisfaction with the result and its desire to resurrect issues already presented in the briefs and heard at oral argument do not provide sufficient grounds to grant a motion for rehearing.

CONCLUSION

Plaintiffs' motion for rehearing is denied.

(Slip Op. 88–84)

BIO-RAD LABORATORIES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 85–06–00862

Before WATSON, *Judge.*

[Plaintiff's motion granted.]

(Dated June 30, 1988)

Elon A. Pollack, (Michael R. Doram); for plaintiff.

John R. Bolton, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch *(James A. Curley)*, for defendant.

MEMORANDUM OPINION AND ORDER

WATSON, *Judge:* Plaintiff has moved under Rule 60(b) to set aside the dismissal of this action on the ground that the discord and confusion accompanying the dissolution of the law firm representing plaintiff as well as the physical and mental disability of the attorney responsible for the action justify the relief sought.

This action was dismissed on June 16, 1987 following a notice of impending dismissal sent on April 23, 1987 to the New York office of Mandel, Resti, Pollack & Borakove. On or about that date the law firm had been dissolved and its office in New York was largely unattended. In addition, the attorney responsible for monitoring the action had recently been hospitalized for a serious physical disability and was undergoing intensive physical and psychiatric therapy as an outpatient.

In September, 1987, plaintiff's present counsel, a partner of the dissolved firm who was and is resident in Los Angeles, learned that the action had been dismissed and filed this motion for relief from the judgment of dismissal.

The government opposes the motion on the ground that the terms of 28 U.S.C. § 2646 (stating that a motion for a retrial or rehearing shall be made not later than thirty days after entry of the judgment) make this motion untimely.

In the opinion of the Court the terms of 28 U.S.C. § 2646 apply to the rehearings available under Rule 59, namely, rehearings which are directed to issues which were treated, revealed, or advanced in the original trial, decision or judgment. For that sort of motion, i.e., to rehear what has been done in plain sight, a limit of 30 days is proper. But for the motion made under Rule 60 and based on reasons which often depend on the discovery of hidden mistakes, frauds or other causes of injustice, which cannot be expected to be uncovered immediately after judgment, it would be absurd and unfair to apply the 30-day statutory limit of 28 U.S.C. § 2646. It would be equally absurd to attribute such an intention to Congress.

The present court rule conforms to the Federal Rules of Civil Procedure and has the same time limits, namely, that it must be made

within a reasonable time, or, for its first three grounds, within one year after the entry of judgment. The mere fact that prior to conforming its Rule 60(b) to the Federal Rules in 1985, this Court had placed a 30-day limit on the motion does not indicate that the limit was compelled by statute. Prior cases of this court did not draw this conclusion. If the case of *Belwith Int'l Ltd.* v. *United States*, 2 CIT 14 (1981) creates any confusion on this point, it should be noted that its citation of 28 U.S.C. § 2646 was unnecessary. A proper reading of that decision reveals that it was the Court rule which made the thirty day limit fatal to plaintiff's motion. That rule was changed and no longer presents an obstacle.

Under the present Rule 60(b) the court's procedure should be fully consistent with the Federal Rules of Civil Procedure and with the relevant case law developed under that rule. As regards the facts underlying this motion, the Court is satisfied that the circumstances constituted exceptional circumstances primarily attributable to the illness of an attorney as in *United States* v. *Cerami*, 563 F.2d 26 (1st Cir. 1977), that relief was sought with reasonable promptness by a properly authorized attorney, and that plaintiff has a meritorious claim.

For these reasons and in furtherance of the paramount interests of doing justice and equity in this matter it is hereby

ORDERED that plaintiff's motion is granted, the Order of Dismissal is set aside and the action is restored to the Joined Issue Calendar where it may remain until September 30, 1988.

(Slip Op. 88–85)

UNITED STATES, PLAINTIFF *v.* WALTER C. LOESCHE AND WORLD FOOD CENTER, INC., DEFENDANTS

Court No. 86–03–00370

Before WATSON, *Judge.*

[Plaintiff's motion for partial summary judgment granted.]

(Decided July 1, 1988)

John R. Bolton, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch (*Platte B. Moring, III*), for plaintiff.

King & Spalding, (*Charles H. Kirbo* and *Hugh Peterson, Jr.*), *Sanders, Mottola, Haugen & Mann* (*Charles Van S. Mottola*), for defendants.

MEMORANDUM OPINION

WATSON, *Judge:* In this action, the Government is seeking to recover civil penalties for violations of 19 U.S.C. § 1592 with respect to importations of orange juice concentrate. It has moved for partial summary judgment as to one entry, Warehouse Withdrawal For Consumption 83–335827–5. As to that entry, defendants pleaded

guilty to a violation of 18 U.S.C. § 1001 in 1985, in the U.S. District Court for the Northern District of Georgia (Criminal No. CR84–385A), and, in addition to criminal penalties, defendants were ordered to make restitution to the Government in the amount of one million dollars under 18 U.S.C. §§ 3579–80.[1]

In its motion for partial summary judgment, the Government contends that all the relevant material facts concerning the importation of that entry of juice concentrate have been established in the criminal action and that, therefore, defendants are estopped from disputing those facts and from denying their civil liability based on these facts under 19 U.S.C. § 1592.

In response, defendants filed a statement pursuant to Rule 56(i) of the Rules of this Court contending that there are genuine issue of material facts which have to be tried. In that statement defendants contend that:

> 1. The government has not established the entry of merchandise, or the attempt to enter merchandise, into the commerce of the United States, which is a necessary element to establish liability for a violation of 19 U.S.C. § 1592.
> 2. The testimony of defendant Walter C. Loesche at his deposition raises a material question of fact as to whether there was the requisite intent to defraud.

In addition, defendants contend that the Government is precluded from bringing this action under 19 U.S.C. § 1592, because it has already received restitution in the criminal judgment pursuant to 18 U.S.C. §§ 3579–80. Furthermore, defendants allege that the Government waived its right to bring this action when it chose to prosecute defendants under the catch-all provision of 18 U.S.C. § 1001[2], rather than under the special customs fraud provision of 18 U.S.C. § 542.[3]

According to defendants, the civil statute 19 U.S.C. § 1592 was intended by Congress to be used exclusively as a civil counterpart of the criminal article 18 U.S.C. § 542, and not in combination with other statutes. Defendants argue that both statutes (18 U.S.C. § 542 and 19 U.S.C. § 1592) originated from a single legislative act as §§ 591 and 592 of the Tariff Act of 1930, and that 18 U.S.C. § 542 specifically authorizes a separate civil action. In contrast, defend-

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[1] These provisions have been renumbered as sections 3663 and 3664, respectively. *See*, Pub.L. No. 98–473, § 212(a)(1), 98 Stat. 1987.

[2] 18 U.S.C. § 1001. Statements or Entries Generally.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[3] 18 U.S.C. § 542. Entry of Goods by Means of False Statements

Whoever enters or introduces, or attempts to enter or introduce into the commerce of the United States any imported merchandise by means of any fraudulent or false statement, written or verbal, or by means of any false statement or fraudulent practice or appliance, or makes any false statement, as to any matter material thereto without reasonable cause to believe the truth of such statement, whether or not the United States shall or may be deprived of any lawful duties; or

Whoever is guilty of any willful act or omission whereby the United States shall or may be deprived of any lawful duties accruing upon merchandise embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement, or affected by such act or omission—

Shall be fined for each offense not more than $5,000 or imprisoned not more than two years, or both.

Nothing in this section shall be construed to relieve imported merchandise from forfeiture under other provisions of law.

ants allege that the catch-all provision of 18 U.S.C. § 1001 does not contain any such authorization and that, instead, it carries more severe penalties. In sum, defendants contend that the criminal judgment which was entered against them in 1985 relieves them of any further civil liabilities.

DECISION

The Court is unable to find any legal support for defendants' theory that the Government is precluded from bringing this civil action. While it is arguable that defendants were hopeful of disposing of the entire matter when they entered into the Plea Agreement with the Government, they failed to negotiate the terms of an agreement to that effect. To the contrary, the Plea Agreement specifically provides that "* * * by entering this agreement the Government does not forego, relinquish, or in any way reduce any other rights or interest it has to proceed against the defendant civilly or administratively for any claim of damages or penalties as the Government so determines"[4].

Similarly, restitution ordered by the criminal judgment does not exhaust the Government's right to pursue additional civil penalties. The statutory scheme and the express language of the Victim and Witness Protection Act (the VWPA), which authorizes the restitution, 18 U.S.C. §§ 3579–80, contemplate a subsequent civil action and specifically direct that the amount of restitution shall be credited against the damages subsequently awarded in such action—

> (2) Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in—
>
> (A) any Federal civil proceeding;

18 U.S.C. § 3579(e).

Furthermore, section 18 U.S.C. § 3580(e) explicitly provides that—

> A conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

The Court of Appeals upheld the constitutionality of these provisions and stated that the *res judicata* provision of the VWPA "* * * merely codifies existing decisions regarding the *res judicata* effect of criminal convictions, *see, e.g., United States* v. *Frank*, 494 F.2d 145, 160 (2d Cir), *cert.denied*, 419 U.S. 828, 95 S.Ct. 48, 42 L.Ed.2d 52 (1974), a result Congress has achieved in other statutes * * *" *United States* v. *Brown*, 744 F.2d 905, 907 (2d Cir.) *cert.denied*, 105 S.Ct.599 (1984).

[4] See, Plaintiff's Motion for Partial Summary Judgment, Exhibit 3.

Finally, the Government's choice initially to prosecute defendants under 18 U.S.C. § 1001, rather than under the special customs fraud provision of 18 U.S.C. § 542 is not relevant to the issues now before this court, because neither criminal statute can operate to preclude this civil action. The right to recover civil damages, in addition to the right of criminal recourse, is vested with the Government, and no special authorization to that effect need be contained in the criminal statute.

At the same time, the extent of penalties which were imposed on defendants in the previous criminal action may be considered before rendering an award in this case.

The Court grants the Government's motion for partial summary judgment and is not persuaded that there exists any material issue of facts which have to be tried. Defendants, fully represented by their counsel, had entered into a Plea Agreement, dated March 21, 1985, in which they pleaded guilty to count 247 of the Indictment with regard to the fraudulent statements which they wilfully and knowingly made. The Indictment states the following undisputed material facts:

> "the defendant, Walter C. Loesche * * * did knowingly and wilfully make and used [*sic*] and caused [*sic*] to be made and used, false writings and documents, then knowing the same to contain materially false, fictitious, and fraudulent statements and entries, that is, the defendant did knowingly prepare, execute and submitted [*sic*] to the United States Customs Service, Department of the Treasury, Atlanta, Georgia, Custom Forms 7505 (Warehouse Withdrawals for Consumption), reflecting for each of the listed juice concentrate entries into the [Atlanta Foreign Trade Zone "ATFZ"] Zone * * * the amount of "MYSO" orange beverage produced within the Zone upon modification, alteration and dilution of the orange juice concentrate; and the duty amount claimed on the "MYSO" orange beverage so produced, as listed below, whereas in truth and in fact as the defendant then and there well knew, the foreign orange juice concentrate had not been so modified, altered and diluted into "MYSO" orange beverage within the Zone * * * in violation of Title 18, United States Code, Section 1001.[5]

Defendants admitted these facts by pleading guilty to this count of the Indictment with regard to a single document, Warehouse Withdrawal For Consumption 83–335827–5.

Careful examination of the defendants' statement pursuant to Rule 56(i) of the Rules of this Court reveals that defendants do not really dispute any material facts, but rely mostly on the difference in the elements of 18 U.S.C. § 1001, in violation of which they pleaded guilty, and 19 U.S.C. § 1592, under which this action is brought.

The material facts which were established under more stringent standards of proof applicable to the criminal proceedings and by defendants' own admissions during that proceeding are binding in this

[5] See, Plaintiff's Motion for Partial Summary Judgment, Exhibit 4, page 12.

action. Defendants had a fair opportunity to fully litigate and contest the issues, but chose to plead guilty with regard to these material facts which constituted a violation of 18 U.S.C. 1001. The Court is satisfied that these material facts, which are not disputed by the parties, also constitute a violation of 18 U.S.C. § 1592. These facts indicate clearly that defendants made certain fraudulent statement wilfully and knowingly, and therefore intentionally,[6] and that such statements were submitted to the United States Customs Service in an attempt to enter the merchandise into the commerce of the United States.

The Court finds that no triable issue of material fact has been raised by defendants in their opposition to plaintiff's partial motion for summary judgment.

For the reasons given above it is hereby

ORDERED that the Government's motion for partial summary judgment is granted, and defendants are held in violation of 19 U.S.C. § 1592 with regard to the Warehouse Withdrawal For Consumption 83–335827–5, the only subject of this summary judgment.

[6] See, *Feuer* v. *Menhes Feuer, Inc.*, 187 N.Y.S.2d 116 (1959); *U.S.* v. *Nephrite Jade*, 325 F. Supp. 986 (1970), the fraudulent intent is assumed whenever the individual knowingly and willfully participates in the statutory violation.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSES Item No.
C88/97	Musgrave, J. June 16, 1988	Hewlett-Packard Co.	87-11-01076	Item 712.05 11.9% or
C88/98	Musgrave J. June 16, 1988	M & L	86-10-01304	Item 383.80 32.5% + lb.
C88/99	Tsoucalas, J. June 17, 1988	Carter Footware Inc.	87-7-00769	Item 386.52 8.2% with allowance item 807.0 value of p textile co of U.S. or except for vamps
C88/100	Re. C.J. June 20, 1988	Belwith Int'l. Inc.	78-5-01174	Item 534.94 Various r
C88/101	Re, C.J. June 20, 1988	Industrias La Famosa Inc.	84-7-01062, etc.	Item 182.98 10%
C88/102	Musgrave, J. June 20, 1988	Industrias La Famosa Inc.	86-6-00732, etc.	Item 182.98 182.99 10%
C88/103	Tsoucalas, J. June 29, 1988	Warner's	83-10-01573, etc.	Item 376.24 32%
C88/104	DiCarlo, J. June 30, 1988	Pharmacia Inc.	73-5-01211 etc.	Item 711.88 11%, 17.5 or 22%

ASSIFICATION DECISIONS

ESSED and rate	HELD Item No. and rate	BASIS	PORT OF ENTRY AND MERCHANDISE
5 r 10%	Item 712.49 Various rates	EAC Engineering v. U.S., S.O. 85-111	Philidelphia Major subassemblies & parts of liquid chromatographs
0 - 17¢ per	Item 383.84 23.6% + 10¢ per lb.	Agreed statement of facts	New York Sleepwear
2 ch e under .00 for precut omponents rigin r shoe	Merchandise entitled to allowance for duties paid against value of shoe vamps assembled into textile shoe vamps	Carter Footware v. U.S., S.O. 87-92	New York Textile shoe uppers
4 rates	Item 727.70 Various rates	Agreed statement of facts	Los Angeles Porcelain knobs
8	Item 155.75 Free of duty	Agreed statement of facts	San Juan Coconut product
8 or	Item 155.75 Free of duty	Industrias La Famosa, Inc. v. U.S., Abs. C86/40	San Juan Coconut product
4	Item 376.28 18%	Agreed statement of facts	El Paso Brassieres
3 5%, 19.5%	Item 661.95 11.5%, 9%, 10% or 5.5%	Pharmacia Fine Chemicals, Inc. v. U.S., 9 CIT	New York Sephadex Column K15/90, etc.

ABSTRACTED CLASSIFICATION DE

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	
				Item No. and rate	Ite
C88/105	DiCarlo J. June 30, 1988	Pharmacia Inc.	75-5-01193	Item 711.88 11%	Item 5.5 Ite Va Ite Va
C88/106	DiCarlo J. June 30, 1988	Pharmacia Inc.	79-3-00479	Item 711.88 11%, 13%, 15% or 17.5%	Item 5.5 9% Item Vari Ite Va
C88/107	DiCarlo J. June 30, 1988	Pharmacia Inc.	81-8-01031	Item 711.88 11%	Item 5.5
C88/108	DiCarlo J. June 30, 1988	Pharmacia Inc.	83-10-01459	Item 711.88 9.2%	Item 8.5
C88/109	Musgrave, J. July 1, 1988	Am-Mex Int'l	86-1-00047	Item 640.25 7.1%	Item Fr
C88/110	Musgrave, J. July 1, 1988	E-Z-EM Co.	86-4-00501	Item 417.80 4.5% or 4.4%	Item $3

ECISIONS — Continued

HELD em No. and rate	BASIS	PORT OF ENTRY AND MERCHANDISE
n 661.95 .5% tem 678.50 Various rates tem 684.97 Various rates	Pharmacia Fine Chemicals, Inc. v. U.S., 9 CIT Pharmacia Inc. v. U.S. Abs. P80/100	New York Sephadex Column K26/100, etc.
n 661.95 .5%, 6.5%, 8% or % n 678.50 ious rates tem 661.68 Various Rates	Pharmacia Fine Chemicals, Inc. v. U.S., 9 CIT Pharmacia Inc. v. U.S., Abs. P80/100	New York Sephadex Column K9/30, etc.
n 661.95 .5%	Pharmacia Fine Chemicals, Inc. v. U.S., 9 CIT 438	New York Tubing nipple, etc.
n 712.49 .1%	Agreed statement of facts	New York Control tower
n A640.25 ree of duty	Agreed statement of facts	San Diego Seamless aluminum can bodies
n 472.12 3.25 per ton	A.N. Deringer v. U.S., S.O.	Portland, Maine Barium sulfate

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